88-960

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

LIBERTY MOBILEHOME SALES, INC.,
Appellant,

v.

STEPHEN EAMIELLO, ET UX.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF CONNECTICUT

JURISDICTIONAL STATEMENT

ROBERT L. HIRTLE,JR., ESQ.
Counsel of Record

RICHARD M. PORTER, ESQ.
DEAN B. KILBOURNE, ESQ.
ROGIN, NASSAU, CAPLAN,
LASSMAN & HIRTLE
CityPlace
Hartford, CT 06103
203/278-7480
Attorneys for Appellant

List of Corporate Affiliates

Pursuant to Rule 28.1, the following corporations are affiliates of Liberty Mobilehome Sales, Inc.: Gills Mobilehome Sales, Inc., Massachusetts; Mobile Home Parks, Inc., Connecticut; Mobile Home Parks, Inc., Massachusetts; Mobile Home Sales, Inc., Massachusetts.

I. QUESTIONS PRESENTED

I. Whether the Connecticut Supreme Court erred in finding that Connecticut General Statute §21-79 does not effect a taking of Petitioner's property without just compensation in violation of the takings clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment to the United States Constitution?

A. Whether the Connecticut Supreme Court erred in finding that Conn. Gen. Stat. §21-79 does not effect a physical occupation taking of petitioner's property without just compensation?

B. Whether the Connecticut Supreme Court erred in finding that Conn. Gen. Stat. §21-79 does not effect a regulatory taking of petitioner's property without just compensation?

II. LIST OF ALL PARTIES

Petitioner: Liberty Mobilehome Sales, Inc.
68 Cooke Street
Plainville, CT 06062

Robert L. Hirtle, Jr., Esq.
Rogin, Nassau, Caplan, Lassman & Hirtle
CityPlace
Hartford, CT 06103

Respondent and other interested parties:

Stephen Eamiello
Rita Eamiello

Edward G. Fitzpatrick, Esq.
175 Church Street, Suite 301
Naugatuck, CT 06770

Joseph I. Lieberman, Esq.
Attorney General
30 Trinity Street
Hartford, CT 06106

Robert M. Langer, Esq.
Assistant Attorney General
30 Trinity Street
Hartford, CT 06106

TABLE OF CONTENTS

	PAGE
I. QUESTIONS PRESENTED.....	i.
II. LIST OF PARTIES.....	ii.
III. TABLE OF AUTHORITIES.....	iv.
IV. OPINIONS BELOW.....	vi.
V. STATEMENT OF JURISDICTION.....	1
VI. CONSTITUTIONAL PROVISIONS INVOLVED	2
VII. STATUTES INVOLVED.....	4
VIII. STATEMENT OF THE CASE.....	15
IX. SUBSTANTIALITY OF THE QUESTIONS PRESENTED.....	22

III. TABLE OF AUTHORITIES

PAGE

Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)..... 26,50

Andrus v. Allard, [444 U.S. 51] U.S. , 108 S.Ct. 1120, 99 L.Ed. 2d 281 (1988) [100 S.Ct. 318 at 327, 62 L.Ed.2d 210]... 42

Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1988).....18,19,22,51, 55

Edelman v. Jordan, 415 U.S. 651, 671 (1974)..... 34

F.C.C. v. Florida Power Corp., 480 U.S. 245, 107 S.Ct. 1107, 1109-13, 94 L.Ed.2d 282 (1987).....36,37,48

Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983)..33,34,35,36,48

Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir.), reh. denied 833 F.2d 1282 (9th Cir.) cert. denied, U.S. 108 S.Ct. 120, 99 L.Ed.2d 281 (1988).. 23,40,43, 44,45,47

Kaiser Aetna, 444 U.S., at 179-180 [100 S.Ct. at 392-93]..... 42

Liberty Mobilehome Sales, Inc. v. Town of Prospect, No. 106145 (J.D. Hartford/New Britain September 23, 1983)..... 17

Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)....22,27,28,35,37,38, 40,43,45,48

Nollan v. California Coastal Comm'n, U.S. , 107 S.Ct. 3141, 3151 97 L.Ed. 2d 677 (1987)....23, 26,27,50

Penn Central Transportation Co. v. New York City, 438 U.S. 104 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978).....26, 50

Richardson v. Ramirez, 418 U.S. 24, 53 (1974).....34

Thompson v. Merlino Enterprises, 208 Conn. 656 (1988).....35

United States v. General Motors Corp., 323 U.S. 373 378 [65 S.Ct. 357, 359 89 L.Ed. 311] (1945).....42

Conn. Gen. Stat. §21-79...1,4,15,19,20,21

Conn. Gen. Stat. §21-80(b).....9,31

28 U.S.C. 1257(2).....1

IV. OPINIONS BELOW

The opinion of the Connecticut Supreme Court entered August 16, 1988, and the opinion of the Connecticut Superior Court, Judicial District of Waterbury, Housing Session, are set out in the Appendix hereto. See Eamiello v. Liberty Mobilehome Sales, Inc., 208 Conn. 620, 546 A.2d (1988); Eamiello v. Liberty Mobilehome Sales, Inc., No. 85-03177, (Connecticut Superior Court, Judicial District of Waterbury, August 31, 1987)

V. STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Connecticut was made and entered on August 16, 1988 and a copy thereof is appended to this statement in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). This action draws in question the validity of Conn. Gen. Stat. §21-79 on the grounds that it effects a taking of private property without just compensation in violation of the takings clause of the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment. The federal constitutional question was timely raised in the trial court, as further described in the Statement of the Case, infra. The Connecticut Supreme Court also decided the constitutional question.

VI. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V.

United States Constitution

In pertinent part: ". . . nor shall private property be taken for public use, without just compensation."

Amendment XIV

United States Constitution

§1 Citizenship rights not to be abridged by States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATUTES INVOLVED

Conn. Gen. Stat. §21-79. OWNER PROHIBITED FROM RESTRICTING RESIDENT'S RIGHT TO SELL.

(a) No owner or operator of a mobile manufactured home park shall require a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards to remove the home from the development at the time such mobile manufactured home is sold or a mortgage on such a home is foreclosed provided that the purchaser or foreclosing mortgagee shall assume and be bound by the rental agreement of the foreclosed mortgagor and shall be bound by the rules and regulations of the park.

(b) A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile

manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary.

(c) The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original

building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home.

(d) Any purchaser of a mobile manufactured home sold by a resident may become a resident of the mobile manufactured home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the owner approves such entry. Such approval may not be withheld except for a good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe (1) that such purchaser intends to utilize the purchased mobile manufactured home for an illegal or immoral purpose or for any purpose that

would disturb the quiet enjoyment of the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the space or lot upon which the purchased mobile manufactured home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval.

(e) Any resident wishing to sell his or her home shall request a written statement of the owner's intentions regarding the condition of the home.

Within twenty days after receipt of such a request, the owner shall approve the home's condition for resale or deliver a written statement to the resident specifying the reasons why the home is not safe, sanitary, or in conformance with aesthetic standards. Failure of the owner to response within twenty days shall be deemed to be an approval of the home's conditions for resale. If the resident disputes the owner's response, he may seek a declaratory ruling from the department of consumer protection. The resident may attempt to correct defects identified by the owner and may again request the owner's approval of the home's condition for resale. If the resident again disputes the owner's response, he may once again seek a declaratory ruling from the department. An owner's statement of

approval shall remain in force for not more than six months. No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller in a sale pursuant to a written contract, or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rent for any other space or lot located in the park.

Conn. Gen. Stat. §21-80(b):

(1) Notwithstanding the provisions of section 47a-23, an owner may terminate a rental agreement or maintain a summary process action against a resident who owns his mobile manufactured home only for one or more of the following reasons:

(A) Nonpayment of rent, utility charges or reasonable incidential services charges;

(B) Material noncompliance by the resident with any statute or regulation materially affecting the health and safety of other residents or materially affecting the physical condition of the park;

(C) Material noncompliance by the resident with the rental agreement or with rules or regulations adopted under section 21-70;

(D) Failure by the resident to agree to a proposed rent increase provided the owner has complied with all provisions of subdivision (5) of this subsection; or

(E) A change in the use of the land on which such mobile manufactured home is located, provided all of the affected residents receive written notice at least three hundred sixty-five days before the time specified in the notice for the resident to quit possession of the mobile manufactured home or occupancy of the lot.

(2) An owner may not maintain a summary process action under subparagraph (B), (C) or (D) of subdivision (1) of this subsection prior to delivering a written notice to the resident specifying the acts or omissions constituting the action or inaction complained of and allowing the resident twenty-one days in which to rememdy such complaint.

(3) Notwithstanding the provisions of section 47a-23, termination of any tenancy in a mobile manufactured home park shall be effective only if made in the following manner:

(A) By the resident giving at least thirty days' notice to the owner;

(B) By the owner giving the resident at least sixty days' written notice, which shall state the reason or reasons for such termination, except that, when termination

is based upon subparagraph (A) of subdivision (1) of this subsection, the owner need give the resident only thirty days' written notice, which notice shall state the total arrearage due provided, the owner shall not maintain or proceed with a summary process action against a resident who tenders the total arrearage due to the owner within such thirty days and who has not so tendered an arrearage under this subparagraph during the preceding twelve months.

(4) Except as otherwise specified, proceedings under this section shall be as prescribed by chapter 832.

(5) Nothing in this subsection shall prohibit an owner from increasing the rent at the termination of the rental agreement if (A) the owner delivers a written notice of the proposed rent increase to the

resident at least thirty days before the start of a new rental agreement; (B) the proposed rent is consistent with rents for comparable lots in the same park; and (C) the rent is not increased in order to defeat the purpose of this subsection.

(C) Notwithstanding the provisions of section 47a-35 and 47a-36, if judgment is entered in a summary process action against a mobile manufactured home owner and resident based upon subparagraph (D) of subdivision (1) of subsection (b) of this section, execution shall not issue until six months from the date of such judgment. The court shall condition such state of execution upon a requirement that the mobile manufactured home owner and resident make payments to the plaintiff in the summary process action in such installments as the court may direct for

the use and occupancy of the premises during the period of such stay at the rate for which such mobile manufactured home owner and resident was most recently liable as rent or in such greater sum as is reasonable in such installments as the court may direct.

VIII. STATEMENT OF THE CASE

The petitioner owns and operates a mobile home park. The respondents purchased a home in the park and rented the lot on which it sits. The petitioner has refused to permit the respondents to sell their mobilehome on its lot. Petitioner contends that Conn. Gen. Stat. §21-79 which authorizes the on-lot resale, effects a taking of private property without just compensation because it transfers to the mobile home owner a marketable right to the permanent occupancy of the park owner's land.

On August 29, 1980, the respondents purchased a used 1971 Newport mobile home from the petitioner for a price of Thirteen Thousand Four Hundred Fifty-Seven and 50/100 Dollars ($13,457.50), including

sales tax and title fees. The mobile home was purchased in place on lot #30 in Harmony Acres. On the date of purchase, the parties entered into a rental agreement for lot #30 for a term of 12-3/4 months from September 8, 1980 to September 30, 1981. At the time of purchase, respondents also received a copy of the park Rules and Regulations.

On September 30, 1981, the respondents' lease was extended to September 30, 1982 by a written addendum. This procedure was followed again on September 29, 1982, extending the lease to October 1, 1983. In September, 1983 the lease was extended to September 30, 1984 by a written addendum.

In accordance with the requirements

of the Supplemental Judgment in Liberty Mobilehome Sales, Inc. v. Town of Prospect, No. 106145 (Connecticut Superior Court, Judicial District of Hartford/New Britain, September 23, 1983) the requirements of the Supplemental Judgment were incorporated into the lease terms. On March 12, 1984, the respondents notified the petitioner that they were selling their mobile home. The petitioner notifed the respondents that they would not be permitted to sell their mobile home on site, for failure to comply with the resale requirements as set forth in the lease.

The respondents complained to the Connecticut Department of Consumer Protection, and on April 15, 1985, the Commissioner of that department issued a declaratory ruling that petitioner's

resale standards 1, 12, 16 and 17 contravened statutory provisions. The respondents moved out of the mobile home in June 1984, and since December 1, 1984, the respondents have refused to pay rent to the petitioner.

The trial court issued its Memorandum of Decision on August 31, 1987, and entered judgment for the respondents on the complaint. Eamiello v. Liberty Mobilehome Sales, Inc., No. 8503177, (Connecticut Superior Court, Judicial District of Waterbury) (August 31, 1987).

On September 16, 1987, the petitioner filed an appeal with the Appellate Court of the State of Connecticut. On December 7, 1987, the Connecticut Supreme Court transferred the Appellate Court appeal to itself pursuant to Section 4023 of the Connecticut Practice Book.

The parties argued the case on May 4, 1988, and the Connecticut Supreme Court issued its decision on August 16, 1988. Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1988).

The question presented by this appeal was first raised in the peitioner's Answer and Special Defenses dated July 17, 1985, specifically as follows:

> 7. Conn. Gen. Stat. §21-79 is unconstitutional as applied, as it deprives Liberty of the due process of law to which it is entitled as an owner of property under the U.S. and Connecticut constitutions."

The question was raised again in the petitioner's post-trial brief.

In ruling on the constitutionality of Conn. Gen. Stat. §21-79(a), the trial court rejected petitioner's contention that permitting the mobile home owner to resell his home on-site "amounts to an alienation on the ownership of real

estate." Memorandum of Decision, supra, p. 24. The court stated that the relationship between the mobile home owner and the park owner is a leasehold, and that the statute's restriction on evictions at the time of resale is a constitutional landlord-tenant law even if the lease has lapsed. Id.

The petitioner filed an appeal with the Appellate Court on September 16, 1987. Among the constitutional issues presented in the petitioner's brief was the following:

> V. Is Connecticut General Statutes Section 21-79(a) constitutional in that it amounts to an alienation of the ownership of real estate without due process of law?

On December 7, 1987, the Connecticut Supreme Court transferred the appeal to itself and the same question was presented for review. The Supreme Court of Connecticut heard oral arguments on May 4, 1988, and rendered a decision on August

16, 1988. The Connecticut Supreme Court held that:

> We conclude that §21-79 as applied to the facts of this case does not involve the actual physical occupation of land for a public purpose, but merely regulates the use to which private property may be put.

Eamiello, supra, 645.

> Section 21-79 strikes a reasonably fair balance betwen the economic interests of mobile home tenants and those of mobile home park operators.

Eamiello, supra, 620.

The petitioner now appeals to the Supreme Court of the United States.

IX. SUBSTANTIALITY OF THE QUESTIONS PRESENTED

The questions presented are so substantial as to require for their resolution plenary consideration, with briefs on the merits and oral argument, for the following reasons:

I. In Eamiello v. Liberty Mobilehome Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1988), the Connecticut Supreme Court decided the question of whether Conn. Gen. Stat. §21-79 effects a taking of petitioner's property by physical occupation without just compensation in violation of the takings clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its decision conflicts with this Court's decision in Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

II. In Eamiello, supra, the Connecticut Supreme Court decided the question of whether Conn. Gen. Stat. §21-79 effects

a taking of petitioner's property by physical occupation without just compensation in violation of the takings clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its decision conflicts with the decision of the Court of Appeals for the Ninth Circuit in Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir.), reh. denied, 833 F.2d 1282 (9th Cir.), cert. denied, U.S. ,108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

III. In Eamiello, supra, the Connecticut Supreme Court decided the question of whether Conn. Gen. Stat. §21-79 effects a regulatory taking of petitioner's property without just compensation in violation of the takings clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its decision conflicts with this Court's decision in Nollan v. California Coastal Com'n., U.S. , 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).

This appeal presents a question of great public importance: whether a State

statute [1] authorizing the transfer from the owner of a mobile home park of what amounts to a fee simple determinable interest in his land to his tenant, the mobile home owner, constitutes a taking of property in violation of the takings clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment to the United States Constitution?

---

1. At least four other states have statutory schemes similar to Connecticut. Cal. Civ. Code §798.73 (West 1982 & Supp. 1986); Florida Statutes §83.271 (renumbered as 83.69); Md. Code §8A-101-114 (1974, 1979 Cum. Supp.); Mass. Gen. Laws Ann. Ch. 140 §32 M. The California statute is discussed below. Infra, p. 40 . The Florida Supreme Court held that the Florida statute prohibiting evictions from mobile home parks except for good cause did not violate either the due process clause or the equal protection clause of the Fourteenth Amendment to the United States Constitution, Stewart v. Green, 300 So. 2d 889 (1979), but

The United States Supreme Court cases determining whether government action constitutes a taking fall under two lines of authority, regulatory taking cases and physical occupation cases. Where the regulatory action does not involve the physical occupation of property, the Court has "long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"

---

also found that a park owner could terminate a tenancy after a substantial duration of not less than twelve months. Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (1974). The Maryland Court of Appeals held that the Maryland statute prohibiting evictions except for good cause and removal from the park upon resale did not constitute a taking. Cider Barrel Mobile Home Court v. Eader, 287 Md. 574, 414 A.2d 1246, 1251 (1980). However, the Cider Barrel court also based its ruling in part on its construal of the statute to permit a park owner to refuse

Nollan v. California Coastal Comm'n, U.S. , 107 S.Ct. 3141, 3151 97 L.Ed. 2d 677 (1987), citing Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978).

Where a permanent physical occupation has occurred, the Court has found a taking

---

to renew an expired lease. Id. The Massachusetts Supreme Judicial Court held that the Massachusetts statute prohibiting park owners from preventing on-lot resales did not constitute a taking. Commonwealth v. Gustafson, 370 Mass. 181, 346 N.E.2d 706 (1976). However, the Gustafson court relied in part upon its interpretation of the Massachusetts statute to permit the park owner to require a tenant to give the park owner a first option to purchase a mobile home. Thus these courts have all upheld the constitutionality of similar statutes, but only by creatively construing them.

per se to the extent of the occupation. The Court has stated that:

> "[w]here governmental action results in '[a] permanent physical occupation' of the property, by the government itself or by others, see 458 U.S., at 432-433, n.9, 102 S.Ct., at 3174-3175, n.9, 'our cases uniformly have found a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," Id., at 434-435, 102 S.Ct., at 3175-3176.

Nollan, 107 S.Ct., at 3145, quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

The Loretto Court held that a physical occupation taking had occurred, despite the fact that the physical invasion authorized by New York City merely consisted of the erection by Teleprompter, a cable television company, of one and one half cubic feet of cable and switchboxes. Id.

I. The Connecticut Supreme Court's Decision Conflicts With This Court's Decision in Loretto v. Teleprompter Manhattan CATV Corp.

In the case below the Connecticut Supreme Court found that the challenged Connecticut statute "is not sufficiently analogous to a physical occupation of property to violate the takings clause as interpreted by the decisions of the United States Supreme Court." Eamiello, supra, 641. In making its determination, the court below chiefly relied on its interpretation of Loretto. Id., 641-643. Petitioner submits that the decision by the court below directly conflicts with the holding in Loretto that a permanent physical occupation of property authorized by the government requires compensation. In particular, the court below misapplied the criteria for establishing a physical occupation taking as set forth in Loretto

when it failed to find that the Connecticut statute works such a taking.

Chapter 412 of the Connecticut General Laws provides that no tenancy may be terminated for lapse of time and prohibits park owners from restricting a resident's right to sell on-site. The prohibition on terminating a tenancy for lapse of time coupled with the resident's unrestricted resale right operate to transfer the fundamental aspects of property ownership--the rights to possess, use and dispose of the property--from park owners to mobile home owners, and thereby effect a taking by physical occupation.

The Connecticut statute stops short of conveying the entire fee simple to the mobile home owner only because the property may revert to the park owner upon the occurrence of a certain contingency,

the closing of the mobile home park in order to change its use. Conn. Gen. Stat. §21-80(b)(1)(E). Should the park owner decide to go out of business altogether and change the use of his land, the reversion only happens after he first gives a one-year notice to quit and complete the eviction proceedings. Id. Thus, the statute in effect transfers to the tenant a fee simple determinable, an estate that ceases to exist only with the occurrence of a stated contingency. See Cribbet, Principles of the Law of Property, 42-45 (1975); 31 C.J.S. Estates Sec. 10; Burke, Connecticut Real Property Law, 268-262 (1984).

The court below sought to distinguish the effect of the Connecticut statute by arguing that the property owner in Loretto

was compelled by the City of New York to permit his land to be occupied for a use to which he never consented, the support of cables and switchboxes. Id. The court contended that although the Connecticut statute gives mobile home owners the right to perpetual occupancy of the park owner's land, the park owner has already consented to the occupancy of the site by the tenant's mobile home at the time when the tenant avails himself of the right to resell on-site under Conn. Gen. Stat. §21-79. Id. The court placed great emphasis on its contention that although the Connecticut statute compels the park owner to permit his land to be occupied perpetually, it only does so for a use to which he originally consented. Id. The court went on to note that Conn. Gen. Stat. §21-80(b)(1)(E) permits a park owner to use the land on which a mobile home

sits for a different purpose, provided he gives the lessee mobile home owner a year's notice prior to dispossession.

The Loretto Court, however, did not condition its finding of a physical occupation taking on the fact that the building owner never consented to the placement of the cables on her building. In fact, in 1970 the previous owner had granted the cable company permission to install a cable on the building before the New York statute was passed in 1973. Loretto, 458 U.S. 419, 102 S.Ct. at 3168-69, 73 L.Ed.2d 868. Despite the prior owner's consent to the same invasion as the City of New York later would compel, the Court nevertheless found a physical occupation taking. Furthermore, the Loretto Court noted that the building owner could avoid the law's compulsion to retain the cable installation by ceasing

to rent the building to tenants, much as the court below argued that the park owner is free to cease to rent lots for mobile homes if he changes his use of the land. 458 U.S. 439, 102 S.Ct. at 3178 n.17. The Loretto Court left no doubt that such an option made no difference to the existence of a permanent physical invasion. Id. The Court stated that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupancy." Id.

Nor do the other taking cases cited by the court below lend any support to its erroneous interpretation of Loretto. The court below cited Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983), (Rehnquist, J., dissenting from dismissal for want of a substantial federal

question) for the proposition that this Court rejected an appeal challenging under the takings clause a municipal ordinance allegedly more burdensome to property owners than the Connecticut statute. Eamiello, supra, 644. The ordinance required property owners to obtain permission from the local rent control board in order to remove rent-controlled property from the rental housing market. Fresh Pond, supra. The property owner complained that the ordinance authorized the tenant to remain indefinitely. Id. This Court dismissed his appeal for want of a substantial federal question. Id.

The court below noted that Fresh Pond has limited value as an authority because the majority did not provide an opinion. Eamiello, supra, 644. See also Edelman v. Jordan, 415 U.S. 651, 671 (1974); Richardson v. Ramirez, 418 U.S. 24, 53

(1974). Fresh Pond, however, is clearly distinguishable from Loretto and the instant case. Unlike the ordinance in Fresh Pond, the ordinance in Loretto and the Connecticut statute authorize permanent occupancy of the property owner's land. The ordinance in Fresh Pond only eliminated the landlord's right to evict a tenant for purposes of demolition without first obtaining a removal permit. Under the ordinance, once all remaining tenants vacate the premises the property owner may then remove his building from the rental housing market. In contrast, the Connecticut statute permits the tenant to occupy his lot permanently and when he dies allows his estate to sell the perpetual leasehold interest. See Thompson v. Merlino Enterprises, 208 Conn. 656, 545 A.2d 1084 (1988). Like the New York ordinance in Loretto, the Connecticut

statute prevents the landlord from ever regaining control over his occupied property short of changing its use altogether.

Furthermore, the ordinance in Fresh Pond did not permit the tenant to sell his right to indefinite occupancy. On the other hand, the Connecticut statute transfers to the tenant the right to occupy the park owner's land permanently, and then authorizes the tenant to sell that right. Thus, contrary to the Connecticut Supreme Court's opinion, the Connecticut statute abrogates common law property rights far more onerously than did the Fresh Pond ordinance.

Nor does this Court's recent decision in F.C.C. v. Florida Power Corp., 480 U.S. 245, 107 S.Ct. 1107, 1109-13, 94 L.Ed.2d 282 (1987) support the Connecticut Supreme Court's failure to find a taking by

physical occupation as in Loretto. See Eamiello, supra, 644, citing F.C.C. v. Florida Power Corp. The question decided by the Court in Florida Power Corp., supra, is entirely different from the one at issue in Loretto and in the instant case. Florida Power Corp, supra, 1111. In Florida Power Corp., a public utility challenged a federal statute empowering the Federal Communications Commission to establish the rates chargeable by utility companies which have voluntarily entered into leases with cable companies renting space on utility poles for stringing television cable. This Court distinguished the effect of the federal pole statute from that of the New York City ordinance in Loretto, noting that:

> while the statute we considered in Loretto specifically required landlords to permit occupancy of their property by cable companies, nothing in the Pole Attachments Act as interpreted

> by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

Id., 1112 (emphasis original). This Court then went on to explain in a footnote that it reserved the question of whether the government could compel a utility to renew a pole rental agreement. The Court noted that:

> [t]he language of the Act provides no explicit authority to the FCC to require pole access for cable operators, and the legislative history strongly suggests that Congress intended no such authorization. . . . [w]e do not decide today what the application of Loretto v. Teleprompter Manhattan CATV Corp. . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.

Id., 1112 n.6 (citation omitted). Florida Power Corp., then, dealt with the government's power to regulate the

landlord-tenant relationship with regard to rent, not with regard to the marketable right to permanent occupancy.[2]

- - - - - - - - - - -

2. The Florida Power Corp Court also noted the utility's contention that

> it is a taking under Loretto for a tenant invited to lease at a rent of $1.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license.

Id., 1112.

The Connecticut Supreme Court seized upon this last line quoted, and from there apparently drew the erroneous conclusion that once a landlord consents to the initial occupancy of his property by a tenant, the government may authorize the tenant to occupy that property permanently without effecting a taking. Certainly, Florida Power Corp. does not stand for this proposition, nor does any other case decided by this Court. When read in its full context the point is clear, that once the tenant has been invited, the government may constitutionally regulate the rent he is charged.

II. The Connecticut Supreme Court's Decision Conflicts With the Decision of the Court of Appeals for the Ninth Circuit in Hall v. Santa Barbara.

The decision below also directly conflicts with the reasoning of the Court of Appeals for the Ninth Circuit in Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir.), reh. denied, 833 F.2d 1282 (9th Cir. 1987), cert. denied, U.S. , 108 S.Ct. 1120, 94 L.Ed.2d 281 (1988). The Hall court relied on Loretto to find a physical occupation taking in circumstances nearly identical to those in the case at bar. Id. 1275-1280. In Hall, a mobile home park owner challenged a statutory scheme closely tracking that of Conn. Gen. Stat. §21-64 et seq. The statutory scheme consisted of a Santa Barbara ordinance and a California statute, which together required park

owners to offer their tenants leases of unlimited duration, terminable only for good cause, and to permit tenants to transfer their interests to new tenants. Id., 1273. The District Court in that case granted the City of Santa Barbara's Motion to Dismiss the park owner's complaint, which alleged that the Santa Barbara ordinance effected a taking of their property in violation of the Fifth Amendment to the United States Constitution. Id., 1273-74.

The Ninth Circuit reversed and found that the allegations of the complaint presented a claim for a taking by physical occupation as in Loretto and its precursors. Hall, supra, 1276.[3] The Ninth Circuit found that Loretto's explanation as to why a physical invasion

---

3. The court remanded the case for further proceedings. Id. The United States Supreme Court denied certiorari. U.S. , 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

of property so seriously interferes with the property owner's rights strongly supported the Halls' taking claim, and quoted this passage from Loretto at length:

> Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' United States v. General Motors Corp., 323 U.S. 373, 378 [65 S.Ct. 357, 359, 89 L.Ed. 311] (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See Kaiser Aetna, 444 U.S., at 179-180 [100 S.Ct. at 392-93]; see also Restatement of Property §7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see Andrus v. Allard, [444

> U.S. 51] at 66 [100 S.Ct. 318 at 327, 62 L.Ed.2d 210], it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36, 102 S.Ct. at 3176 (emphasis original; footnote omitted), cited by Hall at 1277.

Noting that "the right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause," the Ninth Circuit observed that the Santa Barbara ordinance requires the park owner to give mobile home owners an indefinite lease, "a recognized estate in land." Hall at 1276. Coupled with the mobile home owner's right to sell the mobile home to a buyer of his choosing, the court found that the perpetual tenancy deprived the park owner of any "meaningful

say as to who will live on the property, now or in the future." Id.

Most importantly, the Hall court pointed to the ability of the mobile home owner to reap an economic windfall by selling his right to possess the property in perpetuity. Id. at 1276-77. The court found that the ordinance, as it allegedly operates, gives

> landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

Id. at 1279.

The court found unpersuasive the fact that mobile home owners may be removed for cause. Id. at 1277. As in Connecticut, so long as mobile home owners in Santa Barbara pay the rent and behave

themselves, they have an indefeasible right to possession. Id. The court was similarly unimpressed with the fact that the physical occupation was by mobile home owners rather than the government. The court stated that "'[a] permanent physical condition authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.'" Id., quoting Loretto, 458 U.S. at 433 n.9, 102 S.Ct. at 3174 n.9.

The Hall court also found that the district court had to hear evidence on the question of whether the Santa Barbara ordinance substantially advanced a legitimate state interest. Id. at 1281. The court doubted whether the ordinance could advance the Santa Barbara City Council's avowed purpose of alleviating a critical shortage of low and moderate

income housing. Id. Taking the allegations as true, the court reasoned that the ordinance would merely grant a windfall to current mobile home owners at the expense of current park owners. Id. The court noted the allegation that the ordinance has resulted in a substantial increase in the prices of mobile homes. The court suggested that low-income families may have been hindered by the ordinance rather than helped in gaining access to mobile homes. Id.

Finally, the Ninth Circuit found that the district court had to hear evidence as to whether adequate compensation for the taking was paid to the park owner. Id. The court declared that, in order to determine whether adequate compensation was paid for the alleged transfer to each tenant of the park owner's possessory interest in the land, the lower court must

ascertain the value of the interest allegedly transferred to each tenant and the value of what the park owner received, if anything, in addition to normal rental payments. Id. The Ninth Circuit's position, then, is that rental payments compensate the park owner for use of the land during the rental period and for any amenities provided to tenants, but do not constitute compensation for the taking of property.

Although Hall is a case on all fours with Loretto, the court below rejected the Ninth Circuit's reasoning by arguing that neither the Connecticut statute nor the Santa Barbara ordinance work a taking by physical occupation as in Loretto:

> Unlike the Hall court, we conclude that the modification of the common law right of the lessor to absolute control over the term of the lease and the identity of his lessee effectuated by §21-79 in respect to mobile home parks is not sufficiently

> analogous to a physical occupation of property to violate the takings clause as interpreted by the decisions of the United States Supreme Court.

Eamiello, supra, 641. The Eamiello court's failure to distinguish F.C.C. v. Florida Power Corp., Fresh Pond Shopping Center, Inc., and Loretto is discussed above. The court below also suggested that significant differences exist between the Connecticut mobile home statutes and the Santa Barbara ordinance. Eamiello, supra, 641. However, with regard to the question of a physical occupation taking the court never explained what these differences might be, let alone their significance. Thus, the decision by the court below directly conflicts with the decision by the Court of Appeals for the Ninth Circuit over the question of what conditions give rise to a physical occupation taking as set forth in

this Court's decision in Loretto. Although due to the procedural setting of Hall the Ninth Circuit did not decide the issue on the merits, its conflict with the decision by the court below over the interpretation of Loretto, this Court's most definitive statement regarding physical occupation takings, is no less dramatic.

III. The Connecticut Supreme Court's Decision Conflicts with This Court's Decisions in Nollan v. California Coastal Com'n., Agins v. Tiburon, and Penn Central Transportation Co. v. New York City.

By misapplying the standard for the determination of whether the Connecticut statute works a regulatory ruling, the Connecticut Supreme Court's decision directly conflicts with the line of this Court's decisions employing the established taking standard. This Court recently stated that it has

> long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' Agins v. Tiburon, 447 U.S. 255, 260 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127, 98 .Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) ("a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose").

Nollan v. California Coastal Comm'n., 107 S.Ct. 3241, 3146 (1987).

Instead of determining whether the Connecticut Statute substantially advances legitimate state interests, the court below, misconstruing Penn Central, supra, stated that the test for

> whether an economic regulation violates the takings clause depends on the particular circumstances in that case and a balancing of the law's purpose against the extent to which it diminishes the value of private property.

Eamiello, supra, 646. Contrary to the

Connecticut Supreme Court's formulation, this Court's regulatory taking test is not a mere balancing test.

The Connecticut Supreme Court concluded that the statutory rights of a tenant to sell his mobile home on-site, "serves a substantial public purpose in protecting the economic interests of mobile home tenants in selling their homes on-site." Eamiello, supra, 648. The court found that the Connecticut statute protects mobile home tenants from being forced to sell to park owners at a substantial loss and thus benefits those who otherwise could not afford to purchase housing. Id. The court also noted that a task force commissioned by the Connecticut General Assembly found that the refusal by park owners to permit tenants to resell their mobile homes on-site prohibited the tenants from obtaining equity from their

housing investment. Id.

The court below erred in concluding that the statute has a substantial public purpose. Indeed, the statute does allow the mobile home owner to obtain equity in his mobile home. However, the equity built by the mobile home owner as a result of the statute is not based upon the value of the mobile home itself. Rather, by giving the mobile home owner the right to occupy his site permanently, the statute enables the mobile home owner to acquire equity entirely based upon the value of the park owner's land. Permitting one property owner to build equity in the land of another without any compensation is not a substantial public purpose.

The court below claimed that the Connecticut statute prevents mobile home owners from being forced to sell to park owners at a substantial loss. Apparently

the court had in mind the situation where, before the enactment of the statute, a park owner could require the mobile home owner at the termination of his lease to sell the mobile home only to a buyer who would relocate it to another site, or to the the park owner. Prior to the enactment of the statute granting the mobile home owner a permanent occupancy right, however, the mobile home owner did not suffer any such "loss", because he had not gained the valuable right to occupy the park owner's land permanently. The mobile home owner merely had a mobile home, the value of which depended on its characteristics and condition and the length of any lease for a home site. Thus, the value of the mobile home with a lease for a site in a park, and one without such a site differed solely as a function of the value of the leasehold.

Since the leases did not include a right to permanent occupancy, and the park owner could evict a tenant for lapse of time, the on-site value of the mobile home could not differ dramatically from its off-site value. The Connecticut statute changed that economic situation.

The enactment of the Connecticut statute granted an equity windfall to mobile home owners in the form of a legislative gift of the right to occupy the site permanently, and to sell that right along with their mobile homes. The statute also has the effect of granting to mobile home owners any appreciation in the value of the perpetual leasehold. Instead of protecting the mobile home owner's economic interest in the mobile home and the limited leasehold value, the Connecticut statute transfers wholesale the entire bundle of property rights to

the mobile home owner. No rational interpretation can construe the building of equity by the mobile home owner through such a transfer of property rights as either a legitimate or a substantial public purpose.

In the instant case it is undisputed that in 1980 the Eamiellos purchased a used 1971 mobile home from Liberty for $12,500.00 along with the right to rent a lot in Liberty's Harmony Acres Park. Eamiello, supra, 628, 648. Seeking to recover possession of its lot, in April 1984 Liberty offered to repurchase the mobile home for $12,500.00 but refused to permit the Eamiellos to resell on the lot to anyone else. Id. In October 1984 the Eamiellos received an offer to buy their mobile home on-site for $12,500.00. The mobile home at most had a value of $3,500.00 if the buyer could not rent a

lot from Liberty. Id.

It is abundantly clear then that the difference between the on-site value and the off-site value of the mobile home is the value of the right to permanent occupancy of Liberty's lot. It is also obvious that the value of the mobile home on-site increased between 1980 and 1984 due to the appreciation of the value of the permanent leasehold right. Liberty did refuse to allow the Eamiellos to sell on-site, but then offered to purchase the mobile home for its $12,500.00 original cost, not its off-site value. Thus, Liberty never tried to force the Eamiellos to sell at a substantial loss by taking advantage of the difference in the value of the mobile home off-site from its value on-site. Liberty's offer protected the Eamiellos' investment in their mobile home. However, Liberty was unwilling to

pay the Eamiellos for the appreciation in the value of the permanent occupancy right granted to mobile home owners by the Connecticut Legislature.

Permitting mobile home owners to build equity in their mobile homes by transferring to them the rights to possess, use and dispose of the park owners' land clearly does not constitute a legitimate or substantial public purpose. Arguably, in enacting the statute, the Connecticut Legislature also had a more limited legitimate public purpose in protecting the investments of individuals who purchased a mobile home along with the right to rent a lot for a limited time.

The Legislature could have requried the park owner to buy back a mobile home at the tenant's original purchase price. This price would reflect the intrinsic

value of the home and the value of the terminable lease. Petitioner does not concede that the limited protection of the value paid by the mobile home owner for the right to rent a lot for even a limited time would be a legitimate public purpose. However, it is quite clear that the Legislature could have narrowly tailored the statute to promote only its apparent purpose, the protection of the mobile home owner's original investment.

Assuming for the purposes of argument only that such a legislative purpose is legitimate, the effect of the Connecticut statute far exceeds this purpose. The Connecticut statute does not merely protect the mobile home owner's original investment which included the right to occupy a lot for a limited period. By transferring to the mobile home owner the

marketable right to permanent occupancy of the lot, the statute grants the mobile home owner the right to capture the value of the permanent, not just a limited leasehold right, and any appreciation of that value. Thus, the Connecticut statute is not tailored to achieve even such a limited legitimate purpose. In exceeding this purpose, the Connecticut statute effects a taking of the park owner's property without just compensation. The fact that the Connecticut statute may substantially advance a legitimate public purpose at the same time as it advances an impermissible public purpose does not make it any more constitutional than if the law

failed to advance its public purpose altogether.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court accept jurisdiction of this appeal.

PETITIONER
Robert L. Hirtle, Jr.
Dean B. Kilbourne
Richard M. Porter
Its Attorneys

88-960

Supreme Court, U.S.
FILED
NOV 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

LIBERTY MOBILEHOME SALES, INC.,
Appellant,

v.

STEPHEN EAMIELLO, ET UX.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF CONNECTICUT

APPENDIX TO JURISDICTIONAL STATEMENT

ROBERT L. HIRTLE,JR., ESQ.
Counsel of Record

RICHARD M. PORTER, ESQ.
DEAN B. KILBOURNE, ESQ.
ROGIN, NASSAU, CAPLAN,
LASSMAN & HIRTLE
CityPlace
Hartford, CT 06103
203/278-7480
Attorneys for Appellant

TABLE OF CONTENTS

Appendix A - Opinion of Court Below

Appendix B - Opinion of Trial Court

Appendix C - Notice of Appeal

STEPHEN EAMIELLO ET AL. *v.* LIBERTY MOBILE HOME SALES, INC.
(13310)

PETERS, C. J., SHEA, CALLAHAN, GLASS and COVELLO, Js.

The plaintiffs, the owners of a mobile home located on a lot leased from the defendant, sought injunctive relief and monetary damages claiming, inter alia, that the defendant had prevented them from selling the mobile home while it remained on the defendant's lot. The trial court, concluding that the parties' rental agreement imposed conditions that were not permitted by the statute (§ 21-79) prohibiting mobile home park owners from restricting residents' rights to sell, rendered judgment in favor of the plaintiffs. On the defendant's appeal, *held:*

1. The trial court did not err in determining that the imposition of a resale requirement that the mobile home meet a certain national standard was prohibited by § 21-79; § 21-79 (b) expressly provides that failure to meet a national standard such as that specified in the rental agreement may not be used as a reason for withholding approval for a sale unless such failure renders the mobile home unsafe or unsanitary.
2. The defendant's claim that § 21-79 was unconstitutional in that it resulted in the taking of property without just compensation was unavailing; § 21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators.
3. Under the circumstances here, the trial court did not err in determining that the defendant had violated the statute (§ 47a-7 [a]) requiring it to provide running water and that the plaintiffs' failure to pay rent during a period when the water had been shut off was statutorily (§ 47a-4a) excused.

4. The trial court did not abuse its discretion either in finding that damages based on the off-site value of the mobile home were inadequate or in ordering a permanent injunction permitting the plaintiffs to sell their home on-site.
5. The trial court erred in finding that the defendant had violated the Connecticut Unfair Trade Practices Act (§ 42-110b) by enforcing a resale standard which contravened § 21-79; there was sufficient merit to the defendant's constitutional challenge to § 21-79 to preclude a finding that the assertion of their rights was unfair or deceptive.
6. The trial court did not err in awarding compensatory damages to the plaintiffs for the delay between the time of their attempted sale of the mobile home until the date when the injunction was issued, but that court did err in including payments on the principal of the plaintiffs' mortgage in calculating damages; accordingly, the case was remanded for a recalculation of compensatory damages.

Argued May 4—decision released August 16, 1988

Action to recover damages for the defendant's alleged interference with the plaintiffs' right to sell their mobile home, and for other relief, brought to the Superior Court in the judicial district of Waterbury, Housing Session at Waterbury, where the defendant filed a counterclaim, and tried to the court, *Barnett, J.*; judgment for the plaintiffs on the complaint and on the counterclaim, from which the defendant appealed. *Error in part; further proceedings.*

Robert L. Hirtle, Jr., for the appellant (defendant).

Edward G. Fitzpatrick, with whom, on the brief, was *Peter E. Mariano*, for the appellees (plaintiffs).

SHEA, J. In this action the plaintiffs, Stephen Eamiello and his wife, Rita Eamiello, owners of a mobile home, sought injunctive relief and monetary damages against the defendant, Liberty Mobile Home Sales, Inc., which owns the lot where the home is located. The plaintiffs alleged in their amended complaint that the parties' rental agreement in regard to this lot illegally prevented the plaintiffs from selling the home while it remained on the defendant's lot. The trial court ren-

dered judgment for the plaintiffs to recover compensatory damages, punitive damages, costs and attorney's fees on the count of the complaint alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. It also issued a permanent injunction prohibiting the defendant from interfering with the on-site sale of the plaintiffs' mobile home and ordering the defendant to restore running water to the home upon the condition that the plaintiffs resume paying monthly use and occupancy fees to the defendant ten days after their water service has been restored. In addition, it rendered judgment for the plaintiffs on the counterclaim for failure to pay rent to the defendant from December 1, 1984, through the date of judgment, August 31, 1987, on the ground that the plaintiffs' home became untenantable because the defendant had turned off the water supply during this period and the defendant's action in this regard excused the plaintiffs from paying rent or use and occupancy fees pursuant to General Statutes § 47-4a.[1]

[1] General Statutes § 47a-4a provides: "EFFECT OF FAILURE TO COMPLY WITH SECTION 47A-7. A rental agreement shall not permit the receipt of rent for any period during which the landlord has failed to comply with subsection (a) of section 47a-7."

General Statutes § 47a-7 (a) provides: "LANDLORD'S RESPONSIBILITIES. (a) A landlord shall: (1) Comply with the requirements of chapter 368o and all applicable building and housing codes materially affecting health and safety of both the state or any political subdivision thereof; (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition, except where the premises are intentionally rendered unfit or uninhabitable by the tenant, a member of his family or other person on the premises with his consent, in which case such duty shall be the responsibility of the tenant; (3) keep all common areas of the premises in a clean and safe condition; (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances and elevators, supplied or required to be supplied by him; (5) provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and (6) supply running water and reasonable amounts of hot water at all times and reasonable heat except if the building which includes the dwelling unit is not

In its appeal from the judgment, the defendant claims that the trial court erred in concluding that: (1) the parties' rental agreement imposed resale conditions that were not permitted by General Statutes § 21-79;[2]

required by law to be equipped for that purpose or if the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant or supplied by a direct public utility connection."

[2] "[General Statutes] Sec. 21-79. OWNER PROHIBITED FROM RESTRICTING RESIDENT'S RIGHT TO SELL. (a) No owner or operator of a mobile manufactured home park shall require a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards to remove the home from the development at the time such mobile manufactured home is sold or a mortgage on such a home is foreclosed provided that the purchaser or foreclosing mortgagee shall assume and be bound by the rental agreement of the foreclosed mortgagor and shall be bound by the rules and regulations of the park.

"(b) A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary.

"(c) The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home.

"(d) Any purchaser of a mobile manufactured home sold by a resident may become a resident of the mobile manufactured home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the owner approves such entry. Such approval may not be withheld except for good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe (1) that such purchaser intends to utilize the purchased mobile manufactured home for an illegal or immoral purpose or for any purpose that would disturb the quiet enjoyment of the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the space or lot upon which the purchased mobile manufactured home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resi-

(2) General Statutes (Rev. to 1985) § 21-70 (c)[3] gave the department of consumer protection authority to approve resale standards in regard to mobile homes, other than aesthetic standards; (3) the plaintiffs had satisfied the requirements of the supplemental judgment in an unreported action the defendant had

dent within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval.

"(e) Any resident wishing to sell his or her home shall request a written statement of the owner's intentions regarding the condition of the home. Within twenty days after receipt of such a request, the owner shall approve the home's condition for resale or deliver a written statement to the resident specifying the reasons why the home is not safe, sanitary, or in conformance with aesthetic standards. Failure of the owner to respond within twenty days shall be deemed to be an approval of the home's condition for resale. If the resident disputes the owner's response, he may seek a declaratory ruling from the department of consumer protection. The resident may attempt to correct defects identified by the owner and may again request the owner's approval of the home's condition for resale. If the resident again disputes the owner's response, he may once again seek a declaratory ruling from the department. An owner's statement of approval shall remain in force for not more than six months. No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller in a sale pursuant to a written contract, or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rent for any other space or lot located in the park."

[3] General Statutes (Rev. to 1985) § 21-70 (c) provides: "Owners shall submit to the department of consumer protection any proposed change in the terms or provisions, other than rent, of standard written rental agreements, the aesthetic standards to be complied with by the owner and resident in the event of the sale of the mobile manufactured home by the resident, or rules or regulations concerning the resident's use and occupancy of the premises. No change in the terms or provisions, other than rent, of the written rental agreements, aesthetic standards, or rules or regulations shall be effective until the department of consumer protection reviews, approves and files the changes to insure compliance with the provisions of this chapter. Within sixty days after October 1, 1983, all lease provisions, rules or regulations and aesthetic standards in effect shall be submitted to the department of consumer protection for review, approval and filing. Pending review, all lease provisions, rules and aesthetic standards shall be effective and enforceable to the extent that they are in conformance with the provisions of this chapter."

brought against the town of Prospect; (4) General Statutes § 21-68a[4] is not an unconstitutional delegation of legislative authority when it permits a local building inspector to determine whether a mobile home is safe and sanitary, but does not provide any measuring standards; (5) § 21-79 (a) is constitutional despite the claim that it amounts to an unjustified taking of property;[5] (6) § 47-4a applies to an owner of a mobile home located in a mobile home park and precludes recovery on the counterclaim for rent from December 1, 1984; (7) a permanent injunction should be issued prohibiting the defendant from enforcing the resale standards in the parties' lease in order to prevent the on-site sale of the plaintiffs' mobile home; (8) the defendant's attempt to enforce the resale standards in the parties' lease constitutes a violation of CUTPA; (9) and the plaintiffs should be awarded compensatory damages pursuant to the CUTPA count of their complaint. We find no error

[4] "[General Statutes] Sec. 21-68a. EXEMPTION OF CERTAIN MOBILE MANUFACTURED HOMES FROM INSPECTION PROVISIONS OF STATE BUILDING CODE. Any mobile manufactured home manufactured prior to September 1, 1971, and any used mobile manufactured home sold on site or resited on an individual lot outside a mobile manufactured home park shall be exempt from any provisions of the state building code which would otherwise require a third-party inspection on resale or resiting. In the event of resale or resiting of a mobile manufactured home, the local building official in the town where the mobile manufactured home is to be located shall, upon the request of either party, inspect such unit and shall issue a certificate of approval in the case of an on-site sale or a certificate of occupancy in the case of a resiting, to the owner of such unit, provided such authority finds such unit safe for human habitation and the site meets local zoning requirements. A fee of not more than fifty dollars may be charged for such inspection by such building officials."

[5] The defendant in its brief also contended that General Statutes § 21-79a (a) is not constitutional because it is a denial of a park owner's first amendment right of freedom of association and an infringement upon the liberty of contract. Its brief provides no support at all for these claims. Those claims of error not briefed are considered abandoned. *Czarnecki* v. *Plastics Liquidating Co.*, 179 Conn. 261, 262 n.1, 425 A.2d 1289 (1979); *Katsetos* v. *Nolan*, 170 Conn. 637, 641, 368 A.2d 172 (1976); see Practice Book § 4065. Accordingly, we will not review these two constitutional challenges to that statute.

on the first seven claims, but error on the eighth and ninth. Accordingly, we remand the case to the trial court with direction to deny relief on the CUTPA count of the complaint and to recalculate the amount of compensatory damages.

The court found the following facts. On August 29, 1980, the plaintiffs purchased a used 1971 Newport mobile home from the defendant for $12,500. The mobile home was purchased "in place" on a lot in Harmony Acres Mobile Home Park, which the defendant owned, in the town of Prospect. On the date of purchase, the parties entered into a rental agreement for the lot for a period commencing on September 8, 1980, and ending on September 30, 1981. The rental agreement contained the following provision relating to the resale of this mobile home: "The owner hereby notifies the Resident that the resale of his mobile home is restricted by Section 4 of P.A. 74-333. Only mobile homes meeting the requirements of applicable federal, state and municipal laws may be sold in the park. The Resident may, where applicable, file with Owner a certificate from the local building official that the mobile home meets the requirements of applicable federal, state and municipal laws. Said certificate shall be filed with Owner prior to sale and shall be conclusive evidence of compliance. If such a certificate is not filed and the Resident sells his mobile home without the prior approval of the Owner, this lease shall automatically terminate and the mobile home be removed from the premises." Attached to and made a part of the initial rental agreement as appendix A was a copy of rules and regulations. Included in paragraph 10.1 of the rules and regulations was the statement that "[n]o mobile home over ten years old may be resold in place."

On September 30, 1981, the plaintiffs' lease was extended through September 30, 1982, by a written addendum. One of the attached rules and regulations

provided that "[n]o Mobile home over ten years old will be allowed to enter the park or [be] resold on the lot, unless it is built to ANSI-119.1 [American National Standards Institute] minimum specifications." The American National Standards Institute (ANSI), a body sponsored by the Mobile Homes Manufacturers Association, in 1973 established minimum standards for mobile homes. ANSI-119 provides standards for mobile homes concerning body and frame design, and construction requirements for the installation of plumbing, heating and electrical systems.

On September 29, 1982, the parties renewed the plaintiffs' lease until October 1, 1983. An addendum to this lease contained an identical provision providing that no mobile home could be resold on its lot unless it met ANSI-119 minimum specifications. The last addendum to the plaintiffs' lease was executed on August 9, 1983, extending the term from October 1, 1983, to September 30, 1984. Provisions regulating in-place resales were included in both the addendum itself and in the resale standards attached thereto. These resale standards contained a requirement that the plaintiffs obtain a zoning permit and a building permit from the town of Prospect as the original rental agreement of September 8, 1980, had provided, as a condition precedent to selling their mobile home on the lot.

On March 12, 1984, the plaintiffs sent a certified letter to the defendant notifying it of their desire to sell their mobile home. In response to this letter, Arthur Rourke, an independent mobile home broker acting on behalf of the defendant, inspected the plaintiffs' home. He found that the home was sited properly on its lot and that it was in saleable condition, but noticed that the home did not contain a seal certifying that it met ANSI-119 minimum specifications.[6] Following Rourke's

[6] The Mobile Home Construction and Safety Standard Act, 42 U.S.C. §§ 5401 through 5426, which became effective on June 15, 1976, required

inspection, the plaintiffs sent a second certified letter to the defendant in which they requested advice as to further steps that might be necessary to prepare for an on-site resale. The defendant sent a reply letter in which it stated that paragraph one of the resale standards effective on October 1, 1983, required that their mobile home bear a seal certifying that it met ANSI-119 and federal minimum specifications. In addition, this letter informed the plaintiffs that they had to obtain approval from the local building inspector for the wood stove in their home and also had to comply with the requirements of the resale standards attached to the last addendum concerning the permits from the town of Prospect.

After receiving that letter, the plaintiffs learned on April 1, 1984, from Jo Ann Boyce, an employee in the defendant's rental department, that a seal could not be obtained for the mobile home because it was built before 1976, when the federal government began requiring seals. Boyce informed the plaintiffs that they must sell their home "off-site." Two days later, Boyce contacted the plaintiffs and offered to buy their mobile home for the amount of the plaintiffs' initial purchase price of $12,500. The plaintiffs refused this offer.

The plaintiffs took a number of steps in order to sell their home on-site despite the fact that Boyce had told them that they could not do so. On June 6, 1984, a building official for the town of Prospect issued a "certificate of occupancy" approving the plaintiffs' wood stove. In June, 1984, the plaintiffs moved out of their mobile

that every mobile home sold in the United States bear an "approval seal" indicating that it met the mandatory minimum standards prescribed by the Department of Housing and Urban Development (HUD). No mobile home manufactured before June 15, 1976, can obtain the approval seal even if it meets the HUD standard because under the statute that seal may be affixed only at the time it is manufactured. *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 582–83, 414 A.2d 1246 (1980). It is undisputed that the plaintiffs could not obtain a seal for their home.

home into a new home. In October, 1984, a prospective buyer offered to buy their mobile home on-site for $17,500. This buyer withdrew his offer when the defendant refused to permit an on-site sale. In November, 1984, the plaintiffs found a tenant ready to move into their mobile home at a rent of $375 per month with an option to purchase for $17,900. The defendant refused to accept this prospective tenant. On November 24, 1984, the defendant shut off the water connection to the mobile home. On April 10, 1985, a Prospect building official issued a "certificate of occupancy" approving the home for resale. Following a contested hearing, the commissioner of the department of consumer protection on April 15, 1985, issued a declaratory ruling that the resale standards in the parties' lease violated § 21-79 (b). Subsequently, the fire marshall of Naugatuck, in the company of the Prospect fire marshall, found that the home's electrical system was in sound condition and did not present a fire hazard. On October 30, 1985, a Prospect building official issued a "certificate of approval" in the form of a letter that found the plaintiffs' home to be safe and sanitary for human habitation and properly sited.

The defendant continued to maintain that the resale provisions of the rental agreement were valid and refused to allow the plaintiffs to sell their home on-site. When the plaintiffs brought this action against it, the defendant raised a number of special defenses. It contended that the commissioner of the department of consumer protection had exceeded his authority under General Statutes (Rev. to 1985) § 21-70 (c) in issuing a declaratory ruling, that its resale standards did not violate § 21-79, that § 21-79 was unconstitutional, that § 21-68a, the statute under which a Prospect building official had issued a certificate of occupancy, was unconstitutional, that the plaintiffs had failed to obtain the requisite zoning permit, and that a supplemental

judgment in another case required that the defendant enforce the resale provisions in the parties' lease. In rendering judgment for the plaintiffs, the court rejected all of these special defenses. This appeal followed.

I

The defendant first claims that the court erred in determining that the resale standards in the parties' rental agreement were not authorized by § 21-79.

Section 21-79 (a) provides that "a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards" shall not be required to remove the home from a mobile home development when it is sold.

Section 21-79 (b) provides: "A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary."

Section 21-79 (c) provides: "The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home."

The defendant contends that the plaintiffs were bound by a provision in the resale standards incorporated into the rental agreement effective October 1, 1982, that prohibited the on-site resale of a mobile home more than ten years old unless it met the ANSI-119 minimum specifications. It maintains that this clause did not violate the requirement in § 21-79 (b) that failure to meet national standards "shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary."

The trial court first noted that the ten year provision was omitted from the resale standards effective on October 1, 1983. The court inferred from this omission that the defendant itself realized that this restriction had become untenable when § 21-79 (b) was substantially amended effective on October 1, 1983.[7] Public Acts 1983, No. 83-389, § 5. The court indicated that this ten year restriction violated § 21-79 (b), but did not elaborate the grounds for this determination.

The plain language of § 21-79 (a) allows a mobile home park resident to sell his mobile home on-site so

[7] Prior to the enactment of Public Acts 1983, No. 83-389, § 5, General Statutes (Rev. to 1983) 21-79 (b) provided: "Any purchaser of a mobile home sold by a resident may become a resident of the mobile home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the owner approves such entry. Such approval may not be withheld except for good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe (1) that such purchaser intends to utilize the purchased mobile home for an illegal or immoral purpose or for any purpose that would disturb the quiet enjoyment of the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the mobile home space or lot upon which the purchased mobile home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval."

long as it is "safe, sanitary and in conformance with aesthetic standards." Any restrictions that are not related to these criteria inevitably conflict with the legislative intention to make such homes transferable without removal so long as these three statutory specifications are satisfied. Although § 21-79 (b) creates a presumption that a mobile home constructed in accordance with a national standard, such as ANSI-119, is "safe and sanitary," it also provides that failure to meet such a standard "shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary." This subsection specifies further that "[s]uch failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary." The requirement imposed by the defendant that the plaintiffs' mobile home, which was more than ten years old, meet the ANSI-119 specifications directly contravenes § 21-79 (b) by effectively raising a presumption that such noncompliance automatically makes the home unsafe or unsanitary and by allowing approval of an on-site sale to be withheld solely on that ground. This requirement also has the effect of relieving the defendant of its burden of proving that a home is "unsafe, unsanitary or fails to meet the aesthetic standards of the development," as § 21-79 (c) provides. Accordingly, we hold that the trial court did not err in determining that this resale standard was prohibited by § 21-79.

II

The defendant claims next that the trial court erred in determining that General Statutes (Rev. to 1985) § 21-70 (c)[8] provided authority to the department of

[8] General Statutes (Rev. to 1985) § 21-70 (c) was substantially amended by No. 85-512 of the 1985 Public Acts, effective on October 1, 1985. Prior to the enactment of these amendments, the department of consumer protection on June 6, 1985, had ruled that the resale standards in the parties'

consumer protection to approve resale standards, other than aesthetic ones.

Pursuant to § 21-70 (c) the defendant was required to submit to the department of consumer protection (department) the "lease provisions, rules or regulations, and aesthetic standards in effect . . . for review, approval and filing." On June 8, 1984, the department notified the defendant that the documents submitted did not comply with the pertinent statutes. Later, the defendant requested a declaratory ruling on the applicability of nationally recognized standards on the question of safety. On June 6, 1985, the department ruled that § 21-79 prohibited withholding approval for an on-site sale of a mobile home because of nonconformity with such standards.

We need address only summarily the defendant's claim that § 21-70 (c) limits the authority of the department in reviewing and approving the documents required to be submitted by mobile home operators solely to consideration of the aesthetic standards contained therein. This contention is adequately refuted by the text of the statute that "*all* lease provisions, rules or regulations *and* aesthetic standards in effect shall be submitted to the department of consumer protection for review, *approval* and filing." (Emphasis added.) This provision

lease were invalid under General Statutes § 21-79, and, therefore, these amendments are inapplicable to the case at bar.

Section 21-70 (c) currently provides: "Each owner shall file with the department of consumer protection copies of the park's rental agreements, aesthetic standards to be complied with by the owner and resident in the event of the sale of the mobile manufactured home by the resident, and rules or regulations concerning the resident's use and occupancy of the premises. Any change in the documents required to be filed under this subsection, other than a change in rent, shall be filed with the department of consumer protection. No rental agreements, aesthetic standards, or rules or regulations, and no changes in the terms or provisions of such documents, other than a change in rent, shall be effective until such documents or changes are filed with the department of consumer protection."

was applicable to leases and regulations in effect on October 1, 1983, including the lease at issue here for the period October 1, 1983, to September 30, 1984. It plainly authorizes the department to disapprove resale standards not conforming to law. Our conclusion in part I concerning the requirement imposed by the defendant that the plaintiffs' mobile home satisfy the ANSI-119 standard confirms the position of the department in this regard, but also renders the determination made by the department superfluous. This resale standard conflicts with the provision of § 21-79 (b) that approval of a resale may not be based simply upon failure to meet a national standard for mobile homes and thus is invalid.

III

The defendant also claims that the trial court erred in determining that the plaintiffs had satisfied the requirements of the supplemental judgment in an unreported action the defendant had brought against the town of Prospect, *Liberty Mobile Home Sales, Inc.* v. *Prospect*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 106145 (September 23, 1982). It also maintains that the court erred in declining to decide whether such requirements were actually binding upon the plaintiffs. In that action the defendant in this case sought declaratory and injunctive relief against the enforcement of certain Prospect zoning regulations. The court in a supplemental judgment rendered on September 23, 1982, ordered "[t]hat all owners of mobile homes within the park will be required to obtain a building permit and certificate of occupancy from the Town prior to resale of their mobile homes . . . ."

Since the plaintiffs were not parties to the defendant's suit against the town of Prospect and were not notified of the supplemental judgment until they received

a letter from the defendant referring generally to a court "order that affects your lease," it is clear that they are not bound by the judgment under principles of res judicata or collateral estoppel. *State* v. *Fritz*, 204 Conn. 156, 172–73, 527 A.2d 1157 (1987). The judgment required that the defendant make present and future mobile home owners and residents of the park aware of the judgment "by incorporating it by reference in all leases and by other reasonable efforts." The defendant did comply with this provision in the lease in effect from October 1, 1983, to September 30, 1984, and thus the terms of the judgment bind the plaintiffs to the same extent as the other lease provisions but have no independent force.

As we have explained in part I, however, § 21-79 (a) prohibits the operator of a mobile home park from requiring for approval of the on-site resale of a mobile home anything more than that the home be "safe, sanitary and in conformance with aesthetic standards." Thus, the requirement of the 1982 supplemental judgment referred to in the lease that the plaintiffs "obtain a building permit and certificate of occupancy from the town prior to resale," like other resale provisions in the lease, is invalid because it imposes a requirement not sanctioned by § 21-79 (a). Although a provision for such a certificate might be a reasonably efficient method of satisfying the safe and sanitary statutory standard, it cannot be made a sine qua non to approval of a resale.

The claim of the defendant on appeal is that the trial court erred in regarding the two certificates of occupancy obtained from the town as sufficient to satisfy the provision requiring a building permit and certificate of occupancy to be issued by the town of Prospect before resale. The plaintiffs had obtained two certificates of occupancy, one approving their wood stove and the other finding that the mobile home was safe and

sanitary. Whether either or both of these documents satisfies the "building permit and certificate of occupancy" requirement of the judgment is immaterial because the statutory criteria for a resale include no such requirement. The defendant also contends that the supplemental judgment required that the plaintiffs obtain a zoning permit from the town of Prospect. Again, this requirement is irrelevant because the statutory criteria contain no such provision.

IV

The defendant next claims that the trial court erred in failing to conclude that General Statutes § 21-68a is an unconstitutional delegation of legislative authority because the statute permits a local building inspector to inspect a mobile home to determine whether it is safe and sanitary, but does not provide any statutory standards for that determination. Section 21-68a provides in part: "Any mobile manufactured home manufactured prior to September 1, 1971, and any used mobile manufactured home sold on-site or resited on an individual lot outside a mobile manufactured home park shall be exempt from any provisions of the state building code which would otherwise require a third-party inspection on resale or resiting. In the event of resale or resiting of a mobile manufactured home, the local building official in the town where the mobile manufactured home is to be located shall, upon the request of either party, inspect such unit and shall issue a certificate of approval in the case of an on-site sale or a certificate of occupancy in the case of a resiting, to the owner of such unit, *provided such authority finds such unit safe for human habitation* and the site meets local zoning requirements." (Emphasis added.)

The defendant contends that this statute provides no standards for determining whether a home is "safe for human habitation" and, therefore, is an unconstitu-

tional delegation of legislative power. See *New Milford* v. *SCA Services of Connecticut, Inc.*, 174 Conn. 146, 148–51, 384 A.2d 337 (1977).

The court determined, however, that § 21-68a provides adequate standards when read in conjunction with General Statutes (Rev. to 1985) § 29-261,[9] which requires that building officials "shall have had at least five years' experience in construction, design or supervision and . . . shall be generally informed on . . . items of equipment essential for the safety, comfort and convenience of occupants . . . ." It noted that the legislature had enacted § 21-68a in 1976. Public Acts 1976, No. 76-143, § 1. Section 29-261 had remained substantially unchanged since 1969. Public Acts 1969, No. 443, § 6. The court pointed out that the legislature was presumed to have considered the existence of § 29-261 when it enacted § 21-68a. It concluded that local building officials were sufficiently expert in health and safety standards to understand fully and to apply the standards in § 21-68a. In addition, it determined that the building official who had inspected the home was well qualified and that "his inspections furnished adequate support for his conclusion that the plaintiff's mobile home was safe for human habitation." Finally, it noted that the defendant had failed to contend that the inspections were inadequate or that the home was unsafe.

We conclude that the court's finding that the home was safe for human habitation was not clearly erroneous in view of the expert testimony of William Scarpetti, a Prospect building official. *Mallory* v. *Mallory*, 207 Conn. 48, 55, 539 A.2d 995 (1988). Moreover, the defendant had the burden of showing that the home was unsafe

[9] General Statutes (Rev. to 1985) § 29-261 has been amended by No. 86-372 of the 1986 Public Acts and No. 87-55 of the 1987 Public Acts. These amendments have not affected the duties imposed on building inspectors discussed in the text of this opinion.

under § 21-79 (c) and did not present any such evidence. Accordingly, we need not decide whether § 21-68a is unconstitutional on its face because the statute was not applied in an unconstitutional fashion. A party "cannot mount a constitutional challenge to a statute on the basis of its possible applications in circumstances not presented by his own case, unless first amendment freedoms are affected, a situation not claimed to exist here." *State* v. *Madera*, 198 Conn. 92, 106, 503 A.2d 136 (1985).

V

The defendant also claims that the trial court erred in failing to conclude that § 21-79 (a) is unconstitutional because it amounts to an unjustified taking of property in violation of the fifth amendment to the United States constitution, which is applied to state governments under the fourteenth amendment's due process clause.[10] The takings clause of the fifth amendment provides: "[N]or shall private property be taken for public use, without just compensation."

The defendant contends that § 21-79 (a), which establishes that a mobile home that is "safe, sanitary and in conformance with aesthetic standards" may be resold on-site by the tenant who owns it, violates the takings clause in two ways. First, by entering into a lease a park owner virtually grants to the tenant a leasehold in perpetuity so long as he pays rent and obeys reasonable regulations established by the park owner. Second, the tenant may resell his home on-site to a new tenant who gains the same perpetual leasehold rights, although the park owner does retain limited authority under subsection (d) of the statute to reject a prospective buyer where there is reasonable cause to believe that he is financially unqualified or intends to use the home for an improper purpose.

[10] See footnote 5, supra.

The defendant relies heavily[11] upon *Hall* v. *Santa Barbara*, 833 F.2d 1270 (9th Cir.), reh. denied, 833 F.2d 1282 (9th Cir. 1987), cert. denied, U.S. , 108 S. Ct. 1120, 99 L. Ed. 2d 281 (1988). In *Hall*, a mobile home park owner challenged a Santa Barbara city ordinance that required such owners to offer their tenants leases of unlimited duration, terminable only for cause. In addition, the ordinance provided for rent control at below market rates. Id., 1273–74. The ordinance also allowed a tenant to transfer his interest to a new tenant. Id., 1276. The District Court in that case granted the city of Santa Barbara's motion to dismiss the park owner's complaint, which alleged that the ordinance constituted an inverse condemnation in violation of the takings clause of the fifth amendment to the United States constitution. Id., 1273–74. The Ninth Circuit reversed and held that the facts alleged in the complaint were sufficient to state a cause of action. Id., 1274–82. The case was remanded for further proceedings. Id., 1282. The *Hall* court emphasized that it was not resolving the claim on the merits. "Because there has been no trial, we cannot and do not express any view as to whether the Santa Barbara ordinance constitutes a taking." Id. The defendant contends, however, that the

[11] The defendant also relies on *Palm Beach Mobile Homes, Inc.* v. *Strong*, 300 So. 2d 881 (Fla. 1974), and on *Cider Barrel Mobile Home Court* v. *Eader*, 287 Md. 571, 414 A.2d 1246 (1980). Neither case is helpful in supporting the defendant's position that General Statutes § 21-79 violates the takings clause of the fifth amendment to the United States constitution. In *Palm Beach Mobile Homes, Inc.* v. *Strong*, supra, 887, the Florida Supreme Court found that the appellant's challenge under the takings clause to a Florida statute regulating mobile home park owners was moot and did not address this claim. In *Cider Barrel Mobile Home Court* v. *Eader*, supra, 580–81, the Maryland Court of Appeals held that a Maryland statute regulating mobile home park owners did not violate the takings clause. The *Cider Barrel Mobile Home Court* court relied in part on the fact that the statute did "not prevent a park owner from refusing to renew a lease" in determining that the statute was constitutional. Id., 581. The court did not address whether a statute that requires a park owner to demonstrate good cause for evicting a tenant would violate the takings clause.

Hall court strongly implied that the Santa Barbara ordinance constituted a taking under the fifth amendment.

"[United States] Supreme Court cases addressing this question can be divided into two lines of authority: the so-called regulatory taking cases and the physical occupation cases. Regulatory taking cases are those where the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. A typical case of this sort is *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 [reh. denied, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198] (1978), where New York City prohibited Penn Central from building a 55-story office tower over its Grand Central Terminal. Despite the drastic diminution in the value and usefulness of Penn Central's property, the Court held that the city's action did not amount to a taking.

"Physical occupation cases are those where the government physically intrudes upon private property either directly or by authorizing others to do so. A typical case is *Loretto* v. *Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), where New York City authorized Teleprompter to string 36 feet of one-half inch coaxial cable and place two switchboxes, all amounting to about one and one half cubic feet, on a private building. Despite the minimal burden placed on the property owner, the Court in *Loretto* held that a taking had occurred." *Hall* v. *Santa Barbara*, supra, 1275.

The *Hall* court suggested that the Santa Barbara ordinance fell into the second category. "When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in *Loretto* . . . . Reduced to its essentials, appellants' claim is that the Santa

Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto.* See *Fresh Pond Shopping Center, Inc.* v. *Callahan,* 464 U.S. 875, 104 S. Ct. 218, 78 L. Ed. 2d 215 (1983) (Rehnquist, J., dissenting from dismissal for want of substantial federal question)." Id., 1276.

We note initially that *Hall* is not binding precedent on this court, in contrast to a decision by the United States Supreme Court. In view of the procedural posture of the case, the *Hall* court did not reach the merits of whether the Santa Barbara ordinance violated the takings clause and that case at most provides dicta favorable to the defendant's position. Three judges on the Ninth Circuit dissented from the denial of an en banc rehearing of the case and strongly criticized the *Hall* court's reasoning in regard to whether the ordinance violated the takings clause. Id., 1282–84. We decline to apply the rationale of *Hall* to this case for two reasons. First, unlike the *Hall* court, we conclude that the modification of the common law right of the lessor to absolute control over the term of the lease and the identity of his lessee effectuated by § 21-79 in respect to mobile home parks is not sufficiently analogous to a physical occupation of property to violate the takings clause as interpreted by the decisions of the United States Supreme Court. Second, there are significant differences between our mobile home statutes in this case and the Santa Barbara ordinance.

There are significant differences in the degree of infringement upon common law property rights between

a governmentally authorized placement of wires and related devices by a private cable television company on a building without the consent of the owner, as in *Loretto*, and the right given by our statutes to mobile home owners and their transferees to continue to occupy the sites within a mobile home park that were originally leased to them or their predecessors for that purpose consensually. In *Loretto* the building, or portions thereof where the cable equipment was to be installed, had never previously been used for that purpose and the owner was being compelled to allow the attachment of objects to his building for the purpose of supplying a service to which he had never agreed. A mobile home park operator, however, at the point where § 21-79 applies, has already devoted the land upon which the mobile home being sold is situated to the same use for which the land will continue to be occupied beyond the original term of the lease by the same lessee or his transferee. He is not being compelled to permit his land to be occupied for a use to which he never consented.

The restrictions that our mobile home park statutes impose upon the operator's property rights consist of the option given by the statute to the original lessee to extend the term of the original lease indefinitely and to transfer this right to a purchaser of his mobile home. If a mobile home operator decides to use the land on which a mobile home is situated for some other purpose, he is given the right to dispossess the lessee upon giving a year's notice and thus may terminate the statutory options given to the tenant. General Statutes § 21-80 (b) (1) (E).[12] This statutory diminution in the common law rights of a landowner to control the use of his property simply does not rise to the level of a

[12] General Statutes § 21-80 (b) (1) (E) provides: "Notwithstanding the provisions of section 47a-23, an owner may terminate a rental agreement or maintain a summary process action against a resident who owns his mobile manufactured home only for one or more of the following reasons . . .

taking such as that involved in *Loretto,* where the owner was compelled to allow portions of his building to be occupied by equipment to be used for a purpose to which he had never consented.

In *Loretto,* the court plainly indicated that its conclusion that there had been a governmentally sponsored physical invasion of the apartment building by the attachment of cable equipment thereto against the wishes of the owner was not applicable to less apparent intrusions involved in regulating landlord-tenant relationships: "Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, e.g., *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946) (fire regulation); *Bowles* v. *Willingham,* 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944) (rent control); *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922) (emergency housing law); *Block* v. *Hirsh,* 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1921) (rent control)." *Lorretto* v. *Teleprompter Manhattan CATV Corporation,* supra, 440.

"(E) A change in the use of the land on which such mobile manufactured home is located, provided all of the affected residents receive written notice at least three hundred sixty-five days before the time specified in the notice for the resident to quit possession of the mobile manufactured home or occupancy of the lot."

In *Fresh Pond Shopping Center, Inc.* v. *Callahan,* supra, the property owner challenged a Cambridge city ordinance that required him to obtain permission from the Cambridge Rent Control Board to remove property from the rental housing market. He claimed that the ordinance authorized a tenant of the shopping center to remain indefinitely. An equally divided Massachusetts Supreme Judicial Court affirmed the decision of the trial court that the ordinance as applied to the property owner did not violate the takings clause. Id. The United States Supreme Court dismissed the property owner's appeal for want of a substantial federal question. Id. Dismissals for want of a substantial federal question are decisions on the merits of the federal question presented to the court. *Mandel* v. *Bradley,* 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1973); *Troy Ltd.* v. *Renna,* 727 F.2d 287, 303 (3d Cir. 1984). Although *Fresh Pond Shopping Center, Inc.,* is of limited value as an authority because the majority, despite the lone dissent of Justice Rehnquist, did not provide an opinion, the case is significant to the extent that the court dismissed an appeal challenging under the takings clause an ordinance that in many ways is more onerous to property owners than our statute. In *Fresh Pond Shopping Center, Inc.,* the property owner could not remove an entire apartment building from the rental market in order to use the land for a different purpose. In addition, the Cambridge ordinance provided for rent control. As we have noted previously, § 21-80 (b) (1) (E) permits the operator of a mobile home park to terminate a rental agreement if he wishes to use the land for a different purpose, subject to a notice requirement of one year.

In *F.C.C.* v. *Florida Power Corporation,* 480 U.S. 245, 107 S. Ct. 1107, 1109–13, 94 L. Ed. 2d 282 (1987), the United States Supreme Court recently held that the Federal Communications Commission (FCC) can

establish the rates that utility companies may charge cable television systems for using utility poles as supports for stringing television cable without violating the takings clause where the public utility had already entered into agreements for such use of the poles. The court concluded that economic regulation of an existing landlord-tenant relationship was quite different from the situation in *Loretto,* where the court had determined that a New York law requiring a landlord to permit a cable television company to install its cable facilities on his apartment building constituted a permanent physical occupation of property and, therefore, a taking under the fifth amendment. "As we observed in *Loretto,* statutes regulating the economic relations of landlords and tenants are not *per se* takings . . . '[s]o long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.' *Loretto* [v. *Manhattan Teleprompter CATV Corporation,* supra, 440] (emphasis added)." *F.C.C.* v. *Florida Power Corporation,* supra, 1112. "The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." Id.

We conclude that § 21-79 as applied to the facts of this case does not involve the actual physical occupation of land for a public purpose, but merely regulates the use to which private property may be put. See id.; *Fresh Pond Shopping Center, Inc.* v. *Callahan,* supra; *Hall* v. *Santa Barbara,* supra, 1282–84 (Schroeder, J., dissenting). The defendant sold the home on-site to the plaintiffs and voluntarily entered into a rental agreement with them allowing use of the site for that purpose. The right given to the plaintiffs by our statutes to extend the original term of the lease is not equiva-

lent to a governmentally sponsored physical invasion of the defendant's land. The additional right to transfer to a mobile home purchaser the right to continued occupancy of the site, subject to rejection of the transferee for good cause as provided in § 21-79 (d), is quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. Such a statutorily required condition of a lease agreement similarly does not amount to a taking of property for a use never consented to by the owner, as in *Loretto*.

We still must determine, however, whether regulation by the statute was so onerous as to constitute a taking of private property. In *Penn Central Transportation Co.* v. *New York City*, supra, 123–38, the United States Supreme Court concluded that whether an economic regulation violates the takings clause depends on the particular circumstances in that case and a balancing of the law's public purpose against the extent to which it diminishes the value of private property. See *F.C.C.* v. *Florida Power Corporation*, supra.

In *Cider Barrel Mobile Home Court* v. *Eader*, 287 Md. 571, 574, 414 A.2d 1246 (1980), the Maryland Court of Appeals noted that there was a nationwide problem concerning the rights of tenants in mobile home parks: "Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks. Thus, the mobile home owner is compelled to rent space from the park owners who, because of the limited availability of space and the high cost of relocation, are able to dictate unfavorable rental terms and conditions. As a result, mobile home owners often have been forced to buy mobile homes from the park owner in order to obtain a site, to pay excessive entrance fees, to buy specified com-

modities from specified dealers, to pay the park owner a commission on the sale of the mobile home, or, upon sale, to remove it and pay an exit fee." See A Bill to Amend Section 2 of the National Housing Act Relative to Mobile Homes: Hearings on S.2740 Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking and Currency, 91st Cong., 1st Sess. 5 (1969) (statement of William B. Ross); L. Nyberg, "The Community and the Park Owner Versus the Mobile Home Park Resident: Reforming the Landlord-Tenant Relationship," 52 B.U.L. Rev. 810 (1972); R. Hightower, "Mobile Home Park Practices: The Legal Relationship Between Mobile Home Park Owners and Tenants Who Own Mobile Homes," 3 Fla. St. U.L. Rev. 103, 104 (1975).

In 1972 our legislature for the first time enacted statutes regulating mobile home parks. General Statutes (Rev. to 1975) §§ 21-64 through 21-76; Public Acts 1972, No. 186. In presenting the bill to the General Assembly, Representative Richard A. Dice stated: "It is needed mainly because most mobile homes in the state were zoned out by local towns leaving in effect nonconformed uses of these mobile home parks that now exist. As a result those park owners have a monopoly and as we have seen throughout our society monopolies often result in abuses. . . . It is a bill that helps the people who live in these mobile home parks which is mainly made up of people who are elderly, people who have just been married and people who are endeavoring to have housing without going on into low-income cost housing for the state." 15 H.R. Proc., Pt. 4, 1972 Sess, pp. 1706–1708.

In 1973, the General Assembly commissioned a report on the operation of mobile home parks in order to assess the extent to which additional regulation was needed. Office of Legislative Research, Mobile Home Parks in Connecticut (1973). The report concluded: "A basic

problem with mobile home living in Connecticut involves the landlord-tenant relationship in mobile home parks. Because most communities prohibit mobile homes or restrict them to a small number of established parks, there is a scarcity of land available upon which to place a mobile home. The immediate effect of this situation is to place owners of existing mobile home parks in an economically dominant position . . . ." Id., p. 4. The report found that park owners often refused to allow a tenant to sell his home on-site. Id., pp. 4–7. In 1974 the legislature first enacted legislation limiting the authority of park owners to restrict a tenant's right to sell his home on-site. General Statutes (Rev. to 1975) § 21-79; Public Acts 1974, No. 74-333, §§ 4, 12. In 1983 the General Assembly commissioned another task force to examine mobile home park regulations. Mobile Home Task Force, A Report to the Joint Standing Committee on General Law in Response to Special Act No. 82-49 (1983). The task force "found that, in some case[s], [mobile home] park owners do not permit [mobile home] owners to resell their older units in place . . . . This prohibits [mobile home] owners from obtaining equity from their housing investment . . . ." Id., p. 29. The legislature subsequently amended § 21-79. Public Acts 1983, No. 83-389, § 5.

We conclude that § 21-79 serves a substantial public purpose in protecting the economic interests of mobile home tenants in selling their homes on-site. It is undisputed that the plaintiffs' home purchased for $12,500 in 1980, was worth $17,500 at the time of trial if sold on-site, but was valued at most at $3500 if the buyer had to move it to another location. Section 21-79 protects tenants at mobile home parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase more expensive housing.

We also conclude that the statute does not unduly harm the economic interests of mobile home park owners. Unlike the ordinance in *Hall* v. *Santa Barbara,* our statute does not provide for rent control and limit the owner to a below market income. General Statutes § 21-80 (b) (5), of course, does require that rent increases on one tenant be "consistent with rents for comparable lots in the same park." There is no restriction, however, upon a general rent increase for all of the sites within a park. A land owner also may evict a tenant in order to use the site for any purpose other than as a lot for a mobile home, although one year's notice is required. General Statutes § 21-80 (b) (1) (E). The only evidence of economic harm that the defendant has presented is that the tenant who sells his mobile home on-site receives a greater price for his home than it would otherwise bring because of the right to continued occupancy of the site that is also transferred to the purchaser. Because of the scarcity of mobile home sites, resulting largely from zoning ordinances that bar the establishment of new mobile home developments, the legislature could reasonably have concluded that a substantial portion of the price paid for a mobile home purchased on-site is attributable to the continuing right to lease the site that accompanies the sale. If the mobile home park operator could require the site to be vacated, he, rather than the tenant, would be in the position to demand for a mobile home that he had placed on the site a price greater than the home itself would bring because of the right to continued occupancy that is incident to the sale. In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, § 21-79 strikes a reasonably fair balance between the

economic interests of mobile home tenants and those of mobile home park operators. Accordingly, we conclude that the statute does not violate the takings clause of the fifth amendment to the United States constitution.

VI

The defendant also claims that the trial court erred in concluding that General Statutes § 47a-4a applies to owners of mobile homes in a mobile home park and, therefore, in denying its counterclaim for the plaintiffs' failure to pay rent from December 1, 1984, through the date of judgment, August 31, 1987.

Section 47a-4a provides: "A rental agreement shall not permit the receipt of rent for any period during which the landlord has failed to comply with subsection (a) of section 47a-7." Section 47a-7 (a) provides in part: "A landlord shall . . . (6) supply running water and reasonable amounts of hot water at all times . . . ." The court determined that the defendant had violated § 47a-7 (a) when he turned off all running water to the plaintiffs' home on November 24, 1984, and, accordingly, excused their failure to pay rent beginning on December 1, 1984, under § 47a-4a.

The defendant notes initially that the plaintiffs moved out of their home in June, 1984. It contends that the sole reason it shut off the running water on November 24, 1984, was to prevent waterline freeze-up from cold weather after the plaintiffs had already moved out of their home. The trial court, however, was not bound to credit the testimony offered by the defendant in support of this claim.

There was evidence from which the court could have concluded that the defendant's contentions about waterline freeze-up were a pretext to prevent the plaintiffs from selling or leasing their home. Stephen Eamiello

testified that he had provided for the winterization of his home by covering the water pipes with heat tape, checking the insulation in the pipes, and filling the home's heating tank with fuel oil, although there was no evidence indicating whether the defendant was aware of these preparations. The court found that the defendant in November, 1984, had refused to accept a new tenant that the plaintiffs had found for their home, just before it shut off the running water. In addition, the court found that the defendant had refused in October, 1984, to allow a prospective buyer to purchase the home on-site for $17,500. The defendant was clearly aware that the plaintiffs were actively seeking to rent or sell their home and had not abandoned it. In these circumstances, this court will not construe §§ 47a-4a and 47a-7 (a) so as to provide an exception to the defendant's obligation to provide running water. Accordingly, we conclude that the court did not err in denying the defendant's counterclaim for rent.

VII

The defendant next claims that the trial court erred in issuing a permanent injunction prohibiting it from enforcing resale standards that the court had determined violated § 21-79. The defendant contends that money damages were an adequate remedy because the court could have required it to pay the plaintiffs the off-site value of the home, between $3000 and $3500, and also could have ordered the plaintiffs to convey title of the home to the defendant. Accordingly, the defendant maintains that injunctive relief was improper because an adequate remedy existed at law.

The court determined, however, that "[t]here is a substantial difference between the on-site and off-site values of the mobile home." A real estate appraiser testified on behalf of the plaintiffs that the mobile home had a value of $17,500 if it were sold on-site, but that

its value was at most $3500 if the buyer had to move it to another location. The defendant agrees with the appraiser's estimate. We conclude that the court did not abuse its discretion in finding that damages based on the off-site value of the mobile home were inadequate and in ordering a permanent injunction that permits the plaintiffs to sell their home on-site. *Berin* v. *Olson*, 183 Conn. 337, 340, 439 A.2d 357 (1981).

VIII

The final claim of the defendant is that the trial court erred in concluding that the illegality of the resale provisions in the lease under § 21-79 constituted an "unfair or deceptive" act or practice in violation of General Statutes § 42-110b of CUTPA. For this violation the court awarded the plaintiffs compensatory damages of $5356.70, punitive damages of $12,000, "disbursed costs" of $1312.35 and attorney's fees of $26,405 plus taxable costs.

The court's determination that the defendant violated CUTPA was based upon its finding that the resale standard of the rental agreement, which required that the plaintiffs' home meet ANSI-119 minimum specifications before it could be sold on-site, contravened General Statutes (Rev. to 1985) § 21-79 and the public policy established by this statute. See *Conaway* v. *Prestia*, 191 Conn. 484, 492–93, 464 A.2d 847 (1983). The court emphasized that § 21-79 was "a plainly written (and constitutional) statute." The court found that the defendant's enforcement of that resale provision had caused a substantial injury to the plaintiffs by preventing them "from realizing the market value of their mobile home [if it were sold] on-site . . . ." In addition, the court found that the defendant's conduct was unethical and deceptive when it offered to assist the plaintiffs to acquire the building and occupancy permits required for resale by the rental agreement while

at the same time its enforcement of the ANSI-119 resale standard rendered compliance with the permit requirements "an exercise in futility." See *Conaway* v. *Prestia*, supra.

The defendant contends that it enforced this resale standard in the good faith belief that § 21-79 was unconstitutional both as written and applied. It notes that this statute had not yet been construed by our courts and maintains that a defense to CUTPA exists where a party refuses in good faith to obey a statute he believes is unconstitutional as applied to him.

The plaintiffs contend that good faith is not a defense to a CUTPA claim. They note initially that § 42-110b (b) provides that our courts "shall be guided by interpretations given by the Federal Trade Commission and the federal court to section 5 (a) (1) of the Federal Trade Commission Act [15 U.S.C. § 45 (a) (1)], as from time to time amended." They contend that good faith or the absence of an intent to deceive is irrelevant in determining whether a deceptive practice has been committed under the Federal Trade Commission Act. *Warner-Lambert Co.* v. *F.T.C.*, 562 F.2d 749, 763 n.70 (D.C. Cir. 1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 800 (1978); *Doherty, Clifford, Steers, & Shenfield, Inc.* v. *F.T.C.*, 392 F.2d 921, 925 (6th Cir. 1968); *F.T.C.* v. *Pharmtech Research, Inc.*, 576 F. Sup. 294, 301 (D.D.C. 1983). In *Web Press Services Corporation* v. *New London Motors, Inc.*, 203 Conn. 342, 363, 525 A.2d 57 (1987), this court concluded that "knowledge of falsity, either constructive or actual, need not be proven to establish a violation of CUTPA." The plaintiffs contend that the defendant's assertion of a "good faith" defense is inconsistent with our conclusion in *Web Press Services Corporation* that intent is not an element of a CUTPA action.

None of the cases relied upon by the plaintiffs, however, has addressed whether a finding of an "unfair or deceptive" act or practice may be based upon the failure to comply with a statute the constitutionality of which is being contested when there are reasonable grounds for making a constitutional challenge that ultimately proves unsuccessful. In this case the defendant relied in large measure upon the recent decision of the Ninth Circuit Court of Appeals in *Hall* v. *Santa Barbara*, supra, which does lend some support for its claim that § 21-79 is unconstitutional. Our conclusion that *Hall* is distinguishable and not sufficiently persuasive does not mean that there was no substantial basis for the defendant's challenge. Although the subjective good faith of one who has in fact performed an unfair or deceptive act is not a defense to a CUTPA violation, there is nothing unfair or deceptive in a reasonably grounded constitutional challenge of a statute. We do not believe that the legislature intended that the penalties authorized by CUTPA should be imposed upon those who have a reasonable basis for claiming that their constitutional rights have been violated and thus discourage them from asserting their rights. Whether there is such a reasonable basis is, of course, a question of law. In the present case, we have concluded that there was sufficient merit to the defendant's claim of unconstitutionality as to preclude a finding that its assertion was unfair or deceptive.

The ground upon which the trial court relied primarily for its conclusion of a CUTPA violation, that the ANSI-119 standard for resale was "in direct contravention with § 21-79, a plainly written (and constitutional) statute," therefore, is not a sufficient basis for a finding of an "unfair or deceptive" act or practice on the part of the defendant.

The alternative ground for the decision that a CUTPA violation had occurred was that the defendant had

"acted unethically in offering to aid the plaintiffs in the obtainment of [the certificates of occupancy] when its insistence on [the ANSI-119 standard] made any compliance with [the requirement for such certificates] an exercise in futility." This conclusion is also flawed because there is no indication in the finding that the plaintiffs sustained any damages attributable solely to the requirement of the lease for a certificate of occupancy or that their damages were increased because of that provision. Furthermore, the defendant was obliged by the judgment in the earlier suit against the town of Prospect to include that requirement in the lease and to attempt to enforce that provision of the lease. Accordingly, we conclude that the court erred in finding that the defendant had violated CUTPA, and, therefore, in awarding the statutory damages and attorney's fees to the plaintiffs.

The plaintiffs are entitled, however, to recover compensatory damages because the defendant breached their statutory right under § 21-79 to sell their home on-site. The plaintiffs in October, 1984, had found a purchaser who was willing to buy their home on-site for $17,500, but the defendant refused to allow this sale in violation of the statute. The defendant must compensate the plaintiffs for the damages for the delay that transpired from the time of that attempted sale until the date of the judgment, August 31, 1987, when a permanent injunction was issued that enjoined the defendant from interfering with the on-site sale of the home. The court awarded to the plaintiffs compensatory damages in the amount of $5356.70. Mortgage payments for the home, inclusive of principal and interest, paid between October 4, 1984, and August 31, 1987, represent $4591.05 of this amount. The defendant contends that the court erred in including the repayments of principal on the mortgage debt in calculating the amount of compensatory damages. We conclude that in respect

to the mortgage payments the plaintiffs should be compensated only for the interest paid during that time period. It is inappropriate to award the plaintiffs compensatory damages for the principal payments that increased their equity in the home and, therefore, reduced the amount of the mortgage to be paid off upon its resale. Accordingly, it is necessary to remand the case for a recalculation of the compensatory damages.[13]

There is error in part, the judgment is affirmed, except as to the awards for compensatory damages, punitive damages, "disbursed costs," and attorney's fees, which are set aside, and the case is remanded for further proceedings to determine the amount of compensatory damages to be awarded to the plaintiffs.

In this opinion the other justices concurred.

NO. CV-W-8503-177

STEPHEN AND RITA EAMIELLO :SUPERIOR COURT

:JUDICIAL
:DISTRICT
:OF WATERBURY

v.

LIBERTY MOBILEHOME
SALES, INC. :HOUSING SESSION

:AUGUST 31, 1987

MEMORANDUM OF DECISION

In this action, the plaintiffs, owners of a mobile manufactured home[1], seek injunctive relief and monetary damages against the defendant who is the owner of Harmony Acres Mobile Home Park in the Town of Prospect. The plaintiffs contend that the defendant's prohibitions against the on-site sale of their mobile home are illegal and invalid in light of statutory law and rulings by the Commissioner of Consumer Protection.

---

1 The present statutory designation for a mobile home.

On the defendant's part, there are, in addition to the usual denials, a broadside of special defenses. In summary, these defenses are that the plaintiffs have failed to comply with relevant statutory provisions; that the statutes upon which the plaintiffs rely are unconstitutional; that in issuing rulings, the Commissioner of Consumer Protection exceeded statutory authority; that the plaintiffs have failed to comply with contractual resale provisions and with the terms of a judgement* in a prior action wherein the parties were the defendant and the Town of Prospect; and that the plaintiffs have failed to pay rent. A counterclaim has been interposed to collect the rent allegedly due. In a separate summary process suit, the defendant has tried to evict the plaintiffs.

Except for a few explanatory statements, all material allegations of the special defenses and the counterclaim have been denied.

I.

The facts set forth below provide a framework for the competing legal claims. Additional facts, where pertinent, are contained in subsequent portions of this memorandum.

A.

On August 29, 1980, the plaintiffs purchased a used 1971 Newport mobile home from the defendant for a price of $13,457.50. The mobile home was purchased "in place" on lot #30 in Harmony Acres Park. On the date of purchase, the parties entered into a rental agreements* for lot #30 for a period of 12 3/4 months commencing on September 8, 1980 and terminating on September 30, 1981.

Paragraph 7 of the rental agreement contained the following provision relation* to the resale of the mobile home.

> The owner hereby notifies the Resident that the resale of his mobile home is restricted by Section 4 of P.A 74-333. Only mobile homes meeting the requirements of applicable federal, state and municipal laws may be sold in the park. The Resident may, where applicable, file with Owner a certificate from the local building official that the mobile home meets the requirements of applicable federal, state and municipal laws. Said certificate shall be filed with Owner prior to sale and shall be conclusive evidence of compliance. If such a certificate is not filed and the Resident sells his mobile home without the prior approval of the Owner, this lease shall automatically terminate and the mobile home be removed from the premises.

Attached to and made a part of the initial rental agreement as appendix "A" was a copy of rules and regulations. Included in paragraph 10.1 of the rules

and regulations was the statement that "No mobile home over ten years old may be resold in place."

On September 30, 1981, the plaintiff's lease of lot #30 was extended through September 30, 1982 by a written addendum. Paragraph 1 of the attached rules and regulations provided that "No Mobile home over ten years old will be allowed to enter the park or resold on the lot, unless it is built to ANSI-119.1 minimum specifications."

A similar procedure was followed on September 29, 1982, when the plaintiff's lease to lot #30 was extended to October 1, 1983. Attached to and incorporated in the written addendum were two separate documents; one setting forth rules and regulations and the other embodying resale standards. Paragraph 1 of the attachment entitled "Resale Standards" stated that

"No mobile home over ten years old will be allowed to enter the park or be resold on the lot, unless it is built to ANSI-119.1 minimum specifications."

The last addendum to the plaintiff's lease was executed on August 9, 1983 to run for a term from October 1, 1983 to September 30, 1984. As a result of a change in the numbering of lots in the mobile home park, lot #30 was redesignated as lot #88. Provisions regulating in-place resales were included in both the addendum itself and in the attached and incorporated resale standards.

Item 6 of the last addendum informed the plaintiffs that:

> You have the right to sell your home on its lot. In the event of resale, you must comply with paragraph 16 of your rental agreement and the Resale Standards which are attached hereto and made part of your rental agreement.

Paragraph 16 of the original rental agreement executed on September 8, 1980 contained several provisions to insure that a purchaser of a mobile home "in place" met the defendant's qualifications for residence in the park and that rent, security deposit, tax and assessment liabilities were satisfied prior to a transfer of title. For this litigation, the salient points of paragraph 16 were that the mobile home owner was required to give the park owner written notification of an intention from the local building official as set forth in paragraph 7 of the original agreement which has been quoted in full above.

Item 8 of the last addendum was captioned "Resale Rights" and read as follows:

> In addition to the requirements of item 6 above, you must make a written request to the [Park] Owner for an inspection to determine the condition

> of the home. [Park] Owner must respond in writing within 20 days. After remedying any defects you may request reinspection. If you dispute [park] Owner's response to the reinspection you may seek a declaratory ruling from the Department of Consumer Protection. Approval for resale by [park] Owner shall be effective for six months.

In the attached Resale Standards, effective October 1, 1983, two further provisions appeared that are relevant to this lawsuit. Paragraph 1 provided that "No mobile home will be allowed to enter the park or be resold on the lot unless it is built to ANSI-119.1 minimum specifications or other federal or state building code specifications and bearing an appropriate seal." Paragraph 16 stated that in conforming (sic) with court order #106415, each home must be properly sited within its lot and shall comply with the following: Procurement of Zoning permit (including application & fee); Procurement of Building permit (including application

and fee); Resiting of home if necessary; Reblocking and leveling if necessary; Relocation and reconnection of fuel tank (placed on block base); Relocation and reconnection of gas tanks (placed on block base); Precast concrete steps at all doors placed on 8' x 8' patio block base; Vertical White Vinyl skirting -- accessible at any point for service entry to utilities; Minimum 12' x 16' awning with a minimum 10' x 16' block patio beneath awning; maximum 9' x 10' metal shed, placed on a 10 x 10 base made of patio blocks. Post lamp and electrical connection each site; Grading and re-seeding as necessary each site; landscaping beds and shrubbery, each site; Certificate of Occupancy from the building inspector, upon completion and before occupancy will be permitted."

"Court order #106415" mentioned as

the source for paragraph 16 in the Resale Standards, effective October 1, 1983, refers to a case known as Liberty Mobile Home Sales, Inc. - v - The Town of Prospect for which the correct number in the Judicial District of Hartford - New Britain at Hartford is 106145. In that case, a judgement* was rendered on July 28, 1976 and a supplemental judgement* on September 23, 1982. Noncompliance with the terms of the supplemental judgement* is alleged as one of the defendant's principal defenses.

B.

On March 12, 1984, the plaintiffs notified the defendant via certified mail of their desire to sell their mobile home. The reason given was that a second child was expected so that additional space was needed. In response to the plaintiff's

letter, Arthur Rourke, an independent mobile home broker acting on behalf of the defendant, inspected the plaintiff's home on March 26, 1984 and found that it was sited properly on its lot and in saleable condition but that the stove would have to be inspected. Rourke noticed that there was no seal on the plaintiff's home. He told the plaintiffs that he did not know what the seal meant and that he was not sure whether the absence of a seal made any difference.

Following Rourke's inspection, the plaintiffs on March 27, 1984 sent a second certified letter to the defendant. This letter mentioned Rourke's inspection and requested advice as to further steps that might be necessary to prepare for an on-site resale. The defendant's answer, in the form of a letter sent on March 28, 1984

by Jo Anne Boyce of the rental department, confirmed Rourke's finding of a proper siting but informed the plaintiffs of the need to comply with further requirements before an on-site resale would be allowed.

The first requirement mentioned in Boyce's letter was a repetition of paragraph 1 of the resale standards effective October 1, 1983, to wit: "No mobile home will be allowed to enter the park or be resold on the lot unless it is built to ANSI-119 minimum specifications or other applicable federal or state building code specifications and bearing an appropriate seal." The second requirement was that woodburning stoves and fireplaces were not to be installed or operated in any home without an inspection and approval by the local building inspector and that a copy of the approval certificate was to be filed with the park owner. This

requirement appeared on 20.1 of the rules and regulations attached to the last addendum. The third requirement was a verbatim statement of all that was contained in paragraph 16 of the resale standards attached to the last addendum. Boyce's letter ended with the following advisement: "We will assist you in obtaining the necessary permits from the town. A reinspection would be necessary to check for compliance."

After receiving the letter, the plaintiffs learned from Boyce that a seal could not be obtained and, therefore, they could only sell their mobile home "off-site." Nevertheless, the plaintiffs proceeded to satisfy some of the other requirements mentioned in Boyce's letter. Inspections were made by the Prospect Building Official. On June 6, 1984, the

Building Official issued a "certificate of occupancy" approving the plaintiff's wood stove. On April 10, 1985, a "certificate of occupancy" was issued approving the home for resale. In the latter certificate, the building official inserted the wordage "No seals evident but none needed 1971 vintage unit." Subsequently, the Fire Marshall of Naugatuck, in the company of the Prospect Fire Marshall, made a comprehensive electrical inspection of the mobile home at the plaintiff's request. The electrical system was found to be in sound condition and not presenting any fire hazards. Finally, on October 30, 1985, the building official issued a "certificate of approval" in the form of a letter. In the certificate of approval, the building official made some recommendations but found the plaintiff's home to be safe and sanitary for human habitation and properly

sited.

The defendant's continued refusal to permit an on-site sale caused the plaintiffs to complain to the Department of Consumer Protection. On April 15, 1985, the Commissioner of that department issued a declaratory ruling that the defendant's resale standards 1, 12, 16 and 17 contravened statutory provisions. Preceding the declaratory ruling and noted by it was a decision and final order rendered on April 1, 1985, by the Commissioner of Consumer Protection in a contested case as defined in Gen. Stat. 4-166(2), wherein the defendant was the respondent. That order was to discontinue immediately the use and enforcement of Resale Standards 1, 12 16 and 17 against mobile manufactured home owners in Harmony Acres Mobile Home Park.

When the plaintiffs decided to sell their mobile home, they actively sought buyers. a* purchaser was found in October, 1984 for $17,500.00. Because of the defendant's refusal of an on-site sale, the contract was never fulfilled. The plaintiff's home was worth $17,500.00 in place but had, at most, only a value of $3,500.00 if a buyer had to move it to another location. The defendant offered to repurchase the plaintiff's home for $12,500.00.

In June of 1984, the plaintiffs moved to their new house in Naugatuck. Being unable to sell their mobile home, the plaintiffs looked for a tenant and at the end of November found one ready to move in for $375.00 per month with an option to purchase for $17,900. The defendant had

shut off the water connection to the mobile home and refused to accept the new tenant. Another purchaser was found for $17,500.00 in April 1985.

Since December 1, 1984, the plaintiffs have refused to pay rent to the defendants. They have kept the mortgage and taxes on the mobile home current and have paid bills for electricity and fuel oil.

The plaintiffs claim that the defendants actions are violations of the Connecticut Unfair Trade Practices Act, Gen. Stat. 42-110 et seq. Included in their claims for a monetary award are compensatory and punitive damages, costs and attorneys fees.

II.

In 1983, the statutes regulating mobile home parks were substantially revised by Public Acts 83-389 and 83-456 of the January session and 83-3 of the June session. All of the revisions were incorporated into the June public act. Relevant to the issues at hand and involved in the rulings of the Commissioner of Consumer Protection mentioned above are Gen. Stat. 21-68a, 21-70 and 21-79. Effective October 1, 1983, these sections read as set forth below. It should be noted that in these sections and others, the park owner is described as "Owner" and the home owner is described as "Resident"

21-68a:

> Any mobile manufactured home manufactured prior to September 1, 1971, and any used mobile manufactured home sold on site or resited on an individual

lot outside a mobile manufactured home park shall be exempt from any provisions of the state building code which would otherwise require a third party inspection on resale or resiting. In the event of resale or resiting of a mobile manufactured home, the local building official in the town where the mobile manufactured home is to be located shall, upon the request of either party, inspect such unit and shall issue a certificate of occupancy in the case of resiting, provided such authority finds such unit safe for human habitation and the site meets local zoning requirements. A fee of not more than fifty dollars may be charged for such inspection by such building officials.

21-70 (a) (b) and (c):

(a) The owner shall provide each prospective resident, before any rental agreement is entered into, and each resident, at the time of the first renewal of his rental agreement which occurs after October 1, 1983, with a written statement which clearly and conspicuously disclosed in a manner specified by the department, at least the following information: (1) The monthly rental fee and all considerations payable by the

resident to the owner; (2) The length of the rental term; (3) The amount of land granted by the rental agreement; (4) An enumeration of goods and services to be provided by the resident, including those goods and services to be provided to the resident, including those goods and services to be provided free of charge; (5) Whether the owner plans to terminate his operation of the park during the term of the rental agreement; (6) A statement of conditions to be complied with by the owner and resident in the event of the sale of the mobile manufactured home by the resident, including aesthetic standards for resale, which conditions shall not be altered by the owner after the rental agreement has been entered into; (7) The rights of residents regarding eviction under section 21-80; (8) The rights of residents regarding the resale of a mobile manufactured home under section 21-79; and (9) The rights of residents regarding alterations of the rules concerning the residents; use and occupancy of the premises under subsection (b) of this section. No rental agreement entered into on or after the effective date of this act shall be enforceable until the requirements of subdivisions (1) to (9), inclusive, of this

subsection are met. A copy of the standard statement and any modifications thereof shall be filed with the department and approved by the department, if it meets the minimum standards provided in this section and sections 21-82 and 21-83. A copy of such statement shall be signed by the resident at the time of the rental, acknowledging receipt of a completed signed copy and such completed signed copy shall be kept on file by the owner for a period of four years after such resident vacates the park.

(b) No owner may offer a mobile manufactured home space or lot for rent without providing to the prospective resident a copy of a* initial rental agreement before the resident occupies such mobile manufactured home or lot. All renewals offered by the owner to a resident shall be in writing. No owner may rent a mobile manufactured or mobile manufactured home space or lot until a written rental agreement has been signed by both the resident and the owner. The term of such rental agreements shall not be less than one year unless the resident requests, in writing, a term for less than one year. No rental agreement shall provide in any manner for a waiver of any provision of this chapter. An owner, from time to time, may adopt a rule

of regulation, however described, concerning the resident's use and occupancy of the premises. Such rule or regulation shall be enforceable against the resident only if (1) the purpose of the rule or regulation is to promote the convenience, safety or welfare of the residents, preserve the owner's property from abusive use or make a fair distribution of services and facilities held out for the residents generally; (2) such rule or regulation is reasonably related to the purpose for which it is adopted; (3) such rule or regulation applies to all residents on the premises in a fair manner, provided reasonable exemptions may be made for good cause; (4) such rule or regulation is sufficiently explicit in its prohibition, direction or limitation of the residents conduct to fairly inform him of what he shall or shall not do to comply, and (5) the resident has written notice of such rule or regulation at the time he enters into the rental or when such rule or regulation is adopted. A rule or regulation having the effect of substantially modifying the terms of a rental agreement previously entered into by a resident shall not apply to such rental agreements without the written consent of the resident.

(c) Owners shall submit to the department of consumer protection any proposed change in the terms or provisions, other than rent, of standard written rental agreements, the aesthetic standards to be complied with by the owner and resident in the event of the sale of the mobile manufactured home by the resident, or rules or regulations concerning the resident's use and occupancy of the premises. No change in the terms or provisions, other than rent, of the written rental agreements, aesthetic standards, or rules or regulations, shall be effective until the department of consumer protection reviews, approves and files the changes to insure compliance with the provisions of this chapter. Within sixty days after October 1, 1983, all lease provisions, rules or regulations and aesthetic standards in effect shall be submitted to the department of consumer protection for review, approval or filing. Pending review, all lease provisions, rules and aesthetic standards shall be effective and enforceable to the extent that they are in conformance with the provisions of this chapter.

21-79:

(a) No owner or operator of a mobile manufactured home park shall require a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards to remove the home from the development at the time such mobile manufactured home is sold or a mortgage on such a home is foreclosed provided the purchaser or foreclosing mortgage shall assume and be bound by the rental agreement of the foreclosed mortgagor and shall be bound by the rules and regulations of the park.

(b) A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe and unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe and unsanitary.

(c) The owner of a mobile manufactured home shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary or fails to meet the aesthetic standards of the development. No aesthetic standards concerning those physical characteristics such as size, original color or original building materials which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home.

(d) Any purchaser of a mobile manufactured home sold by a resident may become a resident of a mobile home park provided he meets the entry requirements for said park and the owner approves such entry. Such approval may not be withheld except for good cause. For the purpose of this section good cause means a reasonable cause for the owner to believe (1) That such purchaser intends to utilize the purchased mobile manufactured home for an illegal or immoral purpose or for any purpose that would disturb the quiet enjoyment of the other residents of the park or (2) That the purchaser is or will be financially unable to pay the rent for the space or lot upon which the purchased mobile

manufactured home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be an approval.

(e) Any resident wishing to sell his or her home shall request a written statement of the owner's intentions regarding the condition of the home. Within twenty days after receipt of such a request, the owner shall approve the home's condition for resale or deliver a written statement to the resident specifying the reasons why the home is not safe, sanitary or in conformance with aesthetic standards. Failure of the owner to respond within twenty days shall be deemed to be an approval of the home's condition for resale. If the resident disputes the owners response, he may seek a declaratory ruling from the department of consumer protection. The resident may attempt to correct defects identified by the owner and may

> again request the owner's approval of the home's condition for resale. If the resident again disputes the owner's response, he may once again seek a declaratory ruling from the department. An owner's statement of approval shall remain in effect for not more than six months. No owner shall exact a commission or fee with respect to the price realized by the seller unless he has acted as agent for the seller in a sale pursuant to a written contract, or charge a rent for the mobile manufactured home space or lot upon which the mobile manufactured home is located greater than the prevailing rent for any other space or lot located in the park.

On June 8, 1984, the Commissioner of Consumer Protection notified the defendant by letter that the disclosure statement, rental agreement, rules and aesthetic standards which had been submitted for review pursuant to Gen. Stat. 21-70 (c) could not be approved because they did not fully comply with pertinent statutes. Of particular note are the commissioner's comments that the defendant's rental

agreement and resale standards imposed conditions that were not permitted by Gen. Stat. 21-79. In addition to the decision in the contested case on April 1, 1985 and the declaratory ruling issed* on April 15, 1985 at the request of the plaintiffs, the Commissioner had issued at least two other rulings on requests of mobile home owners residing in a park owned by the defendant in Naugatuck. The rulings were consistent in holding that §21-79 prohibited the defendant from imposing conditions that mobile homes not constructed in accordance with a nationally recognized building or construction code were ipso facto unsaleable in place or automatically unsafe.

On May 5, 1985, the defendant asked the Commissioner to reconsider the previous rulings and to issue a declaratory ruling concerning the

applicability of nationally recognized codes or standards on the question of safety. The commissioner's response came in a declaratory ruling on June 6, 1985 of which the material parts were as follows: "Section 21-79 (b) clearly states that the failure of a home to meet any nationally recognized building or construction code or standard shall not automatically raise a presumption that the home is unsafe or unsanitary. Such a failure may not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe and unsanitary. Therefore a mobile manufactured home park owner may use nationally recognized building or construction codes or standards to measure the safety of a mobile manufactured home for resale. However, under Section 21-79 (c), the park owner bears the burden of

showing that a home is unsafe. In carrying this burden, the park owner must prove two points. First, the park owner must show that the home in question fails to meet specific provisions of a construction code or standard. Second, the park owner must prove that this failure to meet the construction code or standard renders the home unsafe or unsanitary."

III.

The case of Liberty Mobilehome Sales, Inc. v. The Town of Prospect, the supplemental judgement* in which the defendant claims is binding upon the plaintiffs requires a look back into time. In 1975, Liberty Mobilehome Sales, Inc., the defendant herein, brought an action seeking declaratory and injunctive relief against the Town. The official file has

been lost but from copies of an amended substitute complaint, the memorandum of decision and judgment, it appeared that one of the issues was whether the Town had waived permit requirements for the park and the layout of lots therein under a pre-zoning ordinance and that another issue was whether certain aspects of the park's operation should be governed by the ordinance, the zoning regulations or later-enacted state law.

On October 3, 1975, an order of notice was issued on the motion of Liberty Mobilehome Sales, Inc. as plaintiff. As requested in the motion and pursuant to the order, named abutting landowners were notified of the pendency of the action by mail and also by publication. Other interested persons, who were represented as being unknown, were given notice by

publication. The ordered legal notices appeared prior to October 11, 1975, in the Naugatuck Daily News, a newspaper circulating in Prospect.

In 1975, there was an association of mobile home owners in the Harmony Acres Park who were represented by counsel in dealings with the park owner. Notice of the pendency of the suit brought by Liberty Mobilehome Sales, Inc. against the Town was not given to the home owners association or to individual home owners except as it and they may have been included in the category of unknown persons for whom notice by publication was directed. Neither the home owners association nor any individual home owners became parties to the suit.

The memorandum of decision and the judgment do not reflect participation by

anyone other than the named parties.

The original memorandum of decision and judgment in Liberty Mobilehome Sales, Inc. v. Town of Prospect were dated July 27 and 28, 1976, respectively. In material aspects, the decision was that by virtue of the adoption of zoning in Prospect, Harmony Acres Park had become a nonconforming use, but that, aside from a municipality's zoning authority, other phases of a mobile home park operation, such as the layout of lots and bulk requirements on specific lots, were to be governed by state law.

Difficulties occurred in the implementation of the judgment occurred* when subsequent aerial photographs and overlays prepared therefrom showed noncompliance with legal bulk and space limitations on many lots. On March 5,

1977, a proposed redesign of lots in the park was discussed with the residents of Harmony Acres at a meeting in the Prospect Town Hall. Also the residents were notified by a letter dated March 11, 1977, that a copy of the proposed new layout of lots would be on display at the park sales office from March 14 to March 19 1977.

On August 4, 1977, Liberty Mobilehome Sales, Inc., as plaintiff, moved to "reopen and modify" the judgment that had been rendered in the suit between it and the Town of Prospect. The motion recited an impossibility of compliance with bulk and spatial requirements on the basis of the map used in the original judgment. The motion also recited that the problem had been discussed at the meeting with the residents on March 5, 1977 and had been the subject of informal conferences with State

and Town representatives. To resolve the problem, the motion proposed that the judgment be opened and modified "to reflect the court's approval" of a revised site plan dated February 22, 1977 and prepared by a specified engineering firm.

A supplemental judgment rendered on September 23, 1982 incorporated a site plan prepared for Liberty Mobilehome Sales, Inc. in 1981 by a different engineering firm. The effect of the supplemental judgment was to approve a plan of development for Harmony Acres Mobile Home Park which limited the number of mobile homes and mobile home spaces or lots to 157 necessitating the elimination of 26 lots from the then developed portion of the park. Liberty Mobilehome Sales, Inc. was obligated to offer a mobile home site to each resident whose lot was eliminated by

the plan of development. Any such resident who declined to move was to be evicted. All construction involved in the approved development plan was required to be completed within six years.

In moving for the supplemental judgment, Liberty Mobilehome Sales, Inc. made no representation of other interested parties to whom notice of the proceedings should be given. No orders of notice were entered. The only parties to the supplemental judgment were the named litigants, Liberty Mobilehome Sales, Inc. and the Town of Prospect. After the supplemental judgment was rendered, Liberty Mobilehome Sales, Inc. on October 11, 1982, sent the following letter to the residents of Harmony Acres:

Dear Resident:

The Superior Court of Hartford County has issued an order that affects your lease. A copy of the court order is available for you to read at either the sales office in Prospect or at the Plainville rental office.

If you have any questions regarding this matter, please feel free to call the Plainville office. Our toll-free number is 753-3012.

The plaintiff's lot was not among those eliminated by the approved plan of development. A result of the supplemental judgment was that the number of the plaintiff's lot was changed from #30 to #88 as shown in the last addendum to their lease executed on August 9, 1983 for a term commencing on October 1, 1983 and ending on September 30, 1984.

In view of the claim, that the

supplemental judgment in Liberty Mobilehome Sales, Inc. v. Town of Prospect requires owners of an existing mobile home on an approved lot to obtain building and zoning permits and certificate of occupancy as preconditions for an on-site sale, all of the numbered paragraphs of that judgment regarding such permits or certificates are hereinafter set forth.

> 5. That prior to siting or resiting a mobile home within the park, [Liberty Mobilehome Sales, Inc.] will obtain or cause the owner to obtain a zoning permit and building permit for the same from defendant Town.

"Siting" means introducing a new mobile home unit into the park and location* it there. "Resiting" means moving a mobile home already sited in the park to another location within the park.

6. That prior to occupancy of a Mobile Home within the park, [Liberty Mobilehome Sales, Inc.] will obtain or cause the owner to obtain a certificate of occupancy for the same from the defendant Town.

9. That all owners of mobile homes within the park will be required to obtain a building permit and certificate of occupancy from the Town prior to resale of their mobile homes and that no resale will be permitted unless the mobile home is

properly sited on an approved lot as shown on the plan of development so as to provide maximum practical distance between adjacent mobile homes. [Liberty Mobilehome Sales, Inc.] shall not lease or rent a lot within the park to any owner who shall not have complied with this Supplemental Judgment within six years from the date of the same.

12. That [Liberty Mobilehome Sales, Inc.] will make all present and future mobile home owners and residents of the park aware of the provisions of this Judgment by incorporating it by reference in all leases and by other reasonable efforts.

IV.

A.

Statutes, the construction of which is a major issue here, are presumed to be constitutional and a party asserting unconstitutionality has the burden of proving the claim beyond a reasonable doubt. Peck v. Jacquemin, 196 Conn. 53,64 (1985). One portion of the defendant's brief is entitled "Section 21-68a is Unconstitutional as applied." The substance of the contention, however, is directed mainly to the statute as written. The claim has been considered in terms of both facial validity and validity in application.

Gen. Stat § 21-68a became part of our law in 1976. P.A. 76-143 §1. As

originally enacted, the section applied only to mobile homes manufactured prior to September 1, 1971. In 1983 by P.A. 83-389 §1 (Jan. sess.), the section was expanded to include any used mobile home sold on site or resited on an individual lot outside a mobile home park. The section exempts these categories of mobile homes from any provision of the state building code which would otherwise require a third party inspection. See Gen. Stat. §21-68. The exemption is qualified by the authority of the local building official to inspect, upon the request of either party, and to issue a certificate of approval for an in-place sale, or a certificate of occupancy for a resiting provided the building official finds the mobile home to be safe for human habitation and that the site meets zoning requirements.

There is no dispute that the Prospect Building Official inspected the plaintiff's home or as to the issuance of the second certificate of occupancy on April 10, 1985 and the certificate of approval on October 30, 1985. The defendant's position is that no standards for a building official's determination of safety or habitability are stated within the confines of §21-68a and, for that reason, the statutes must be declared unconstitutional. The court disagrees.

The modern tendency in legislation is to supply board regulatory guidelines to facilitate the operation of administrative agencies. Forest Construction Co. v. Planning & Zoning Commission, 155 Conn. 669, 679 (1967). Whether premises are safe for human habitation is primarily a question of fact. See Evergreen

Corporation v. Brown, 35 Conn. Sup. 549, 552 (1978). Whether §21-68a, is with or without standards must be determined by reference to the qualifications and expertise required by law of the local building official, the person to whom a decision on the factual question is confided. One rule of construction is that statutes on a particular subject must be considered as a whole with a view to reconciling their separate parts even when the legislature has chosen to place related laws in different parts of the General Statutes. In re Juvenile Appeal, 189 Conn. 276, 289 (1983).

In amending and enlarging §21-26 in 1983, the legislature is presumed to have considered the comprehensive qualifications and extensive expertise required by §29-261(a) for appointment as a local

building official. A second rule of construction is that in enacting a law, the legislature does so in view of existing statutes and intends its act to be read with them to make one consistent body of law. Doe v. Institute of Living, Inc., 175 Conn. 49,58 (1978). On established principles of statutory interpretation, §21-68a is not without adequate standards.

A claim of unconstitutionality in application could conceivably involve the nature of a building official's inspection. At the time of trial, the Prospect Building Official had been appointed for approximately five years and he was called as a witness on three separate occasions. From his testimony, the court finds that his inspections furnished adequate support for his conclusion that the plaintiffs' mobile home

was safe for human habitation. No complaint concerning the nature of the inspections appears in the defendant's brief. The defendant has failed to prove its claim that §21-68a is unconstitutional as applied. In areas other than First Amendment freedoms, the constitutionality of a statute is to be tested by the fact at hand. State v. Madera, 198 Conn. 92,106 (1985).

B.

Another issue with a constitutional underpinning is the defendant's claim that Gen. Stat. §21-70 (c) provided no authority for the Department of Consumer Protection to approve or disapprove any of the defendant's resale standards aside from aesthetic ones. It is well-recognized that an administrative agency may regulate only

as permitted by enabling legislation. State v. White, 204 Conn. 410,418-19 (1987).

As with the preceding claim this one also involves statutory interpretation. When §21-70 (c), was enacted as P.A. 83-389 §2 (c) park owners became obligated to submit to the Department for review, approval and filing "all lease provisions, rules or regulations and aesthetic standards [then] in effect." Aesthetic standards for resale were included for the first time in the written statement of conditions for resale that an owner was obligated to give to a resident by P.A. 83-389 §2(a) codified as §21-70(a). The defendant's argument is that by including aesthetic standards in §21-70 (c) and by not mentioning other specific conditions of resale in the same subsection, any other conditions have been excluded from the Department's purview.

Standing alone, §21-70 (c) is certainly not a model of clarity. But the defendant's argument appears to have been made before and discountenanced in Liberty Mobilehome Sales, Inc. v. Cassidy, 6 Conn. App. 723 (1986). Although the precise holding of that case is a jurisdictional ground, the following comment of the court therein relating to the present claim is persuasive. "General Statutes §21-64 through 21-84a contain provisions which authorize DCP to issue licenses for the operation of mobile home parks and also allow DCP (sic) to review the conditions imposed by the park operator for the resale of mobilehomes." 6 Conn. App. at 725.

What has been said earlier about construing statutes as a whole with a view to reconciling separate parts applies with

equal force here. A reading of subsections (a) (b) & (c) of §21-70 together with §21-82 (necessary inclusions in the model rental agreement) demonstrates a legislative intent to place the entire rental agreement including rules or regulations and all resale conditions under the regulatory authority of the Department of Consumer Protection.

Related to the above claim is the defendant's suggestion that in amending §21-70 (c) by P.A. 85-512 §1 (c), the legislature has manifested an intent that the Department of Consumer Protection did not have authority to review and approve a park owner's resale standards. The particular subsection of the subsequent public act, now codified as §21-70 (c) (Rev. to 1987) provides only for a filing of rental agreements, aesthetic standards

and rules or regulations.

There are instances, of course, when the legislature clarifies its original intention through subsequent legislation. See e.g. State v. Blasko, 202 Conn. 541,557 (1987); Koskoff, Koskoff & Breder v. Allstate Ins. Co., 187 Conn. 451,455 & n.4 (1982). P.A. 85-512 §1 (c) however, does not appear to be one of them. The same public act, in §1 (a) (Gen. Stat. § 21-70 (c), Rev to 1987) empowered the Department of Consumer Protection to adopt regulations governing a new and separate disclosure statement wherein all rights and obligations of mobile home park residents and mobile home park owners, under Gen. Stat. §21-64 through 21-84a are to be summarized in plain language. In short, the enactment of P.A. 85-512 does not appear to have diminished the regulatory

authority of the Department in any relevant way.

C.

At the heart of the controversy on statutory validity is Gen. Stat. §21-79, as amended by P.A. 83-389 §5, quoted in full at pp 11-12, ante and the interpretation placed on it by the Commissioner of Consumer Protection. Before discussing the Commissioner's interpretation, the court must decide whether the defendant is able to contest it through a special defense in this litigation. The administrative actions and the appeals therefrom surround the instant case like a procedural thicket.

When this case was returned to court on April 9, 1985, the plaintiffs had not received the declaratory ruling concerning

the defendant's resale standards for which they had applied on October 15, 1984. That ruling came forth one week later on April 15, 1985. The two similar rulings issued on petitions brought by residents in the defendant's Naugatuck park were in existence in 1984. Declaratory judgment suits were brought by the defendant to have the Naugatuck rulings reviewed. But, as a nonpetitioner for the underlying rulings, the defendant lacked the standing required by Gen. Stat §4-175 for judicial review. Liberty Mobilehome Sales, Inc. v. Cassidy, supra at 726.

The defendant petitioned for its own declaratory ruling on the validity of its resale standards and the constitutionality of §21--79 as well on March 7, 1985. The commissioner's ruling, in partial disagreement with the defendant's

interpretation, came on June 7, 1985. The defendant did not seek judicial review of the commissioner's ruling although, as a petitioner, it had standing to do so. Gen. Stat §4-175.

From what has been presented to the court, however, it appears that the defendant's request for a declaratory ruling must have been in substantial repetition of claims made in the earlier contested case brought by the Department of Consumer Protection against the defendant on August 28, 1984 and decided by the Commissioner on April 1, 1985. See Gen. Stat §4-166(2), 4-177. The Commissioner's decision in the contested case, known administratively as In the Matter of Liberty Mobile Home* Sales, Inc., Docket No. 84-158 was appealed by the defendant. Id. 4-183. At present, the defendant's

administrative appeal is languishing on the Hartford docket.

Direct judicial adjudication even of constitutional claims is not warranted when the relief sought by the litigant could conceivably be obtained through an alternative statutory proceeding. School Administrators Ass'n v. Dow, 200 Conn. 376,385 (1986); La Croix v. Board of Education, 199 Conn. 70,87 (1986). On the above state of facts, however, the administrative appeal and the present action came into being almost simultaneously. Further, the failure to process the administrative appeal promptly may not be due to the fault of the defendant. Under these circumstances, a direct adjudication of the constitutionality of §21-79 should not be precluded on a theory of failure to exhaust

administrative or statutory appellate remedies. See La Croix v. Board of Education, supra at 81.

With respect to §21-79, the defendant's stated overall contention is that the statute is unconstitutional as applied. But, as with previous attack on the constitutionality of §21-68a, this claim, also, is directed primarily to the the statutory language per se.

One of the defendant's claims is that the restriction, in §21-79(a) restricting a park owner's ability to remove his home at the time of sale amounts to an "alienation" on the ownership of real estate. Again, the court must disagree. The restriction is not, as the defendant would have it, some inexplicable statute of mortmain. The restriction is not absolute

as it is dependent upon a safe and sanitary mobile home and one that conforms to the park's aesthetic standards. Essentially, the relationship between the mobile home owner and the park owner is a leasehold. And, therefore, the restriction is better understood and appreciated as an aspect of landlord-Tenant law where limitations on the landlord's right to evict are not uncommon. See e.g. Gen. Stat. §47a-20, 47a-36.

The dispute between the defendant and the Department of Consumer Protection, which is a prominent feature in this suit, involves the "presumption and inference" language of §21-79(b) and also the placement of the burden of persuasion on the park owner by §21-79 (c). The defendant's request for a declaratory ruling from the Commissioner was followed

by an explanatory letter dated April 18, 1985. In the letter, the defendant explained that the ruling was sought for the purpose of securing the commissioner's approval of a standard for on-site sales that would allow a park owner to use a nationally recognized standard such as the industry-formulated code adopted by the American National Standards Institute (ANSI) to measure the safety of a mobile home. The letter also stated that the defendant did not "automatically presume that a mobile home is unsafe because it was not constructed in accordance with any nationally recognized standard."

In the responsive ruling based on §21-79, the Commissioner did not disagree with all aspects of the plaintiffs position. The declaratory ruling was that pursuant to the presumption of subsection

(b), a park owner could use nationally recognized codes or standards to measure the safety of a mobile home that was being offered for resale. In view of the burden of persuasion placed on the park owner by subsection (c), however, the declaratory ruling also stated that in using such codes or standards, the park owner had to establish two points; (1) that the mobile home failed to meet specific provisions of a code or standard; and (2) that this failure made the mobile home unsafe or unsanitary.

No judicial interpretation of §21-79, as amended in 1983, has been brought to the court's attention and none has been found in the court's own research. When a statute has not hithereto been judicially costrued*, its interpretation presents a question of law

on which the prior ruling of the Commissioner of Consumer Protection is entitled to no special preference. Schlumberger Technology Corporation v. Dubno, 202 Conn. 412,423 (1987). An examination of the commissioner's ruling, however, demonstrates complete consistency between the administrative interpretation and the statutory provisions. The language of §21-79 (b) & (c) is so plainly written that no room is left for construction and these sections should be applied as their words direct. Warner v. Leslie Elliot Constructors, Inc., 194 Conn. 129,135 (1984). The question of constitutionality, of course, presents a separate issue for decision.

As a prologue to the discussion of whether §21-79 is "unconstitutional as applied," certain facts in this case

deserve emphasis. First, no evidence was presented to rebut the factual conclusions of the Prospect Building Official and the Naugatuck Fire Marshall that the plaintiffs' mobile home was safe and sanitary for human habitation. Second, the defendant's inspector, Arthur Rourke, found very little that was wrong with the plaintiffs' home and his suggested improvements, which the plaintiffs agreed to make, were principally cosmetic in nature and have not been included in the defendants briefed claims of unsafe conditions. Third, all of the items on the defendant's inspection list which conceivably could fit into the category of construction received check marks from Rourke. Although Rourke was not called as a witness, Lucille Guzauskas, the defendant's president testified that Rourke's check marks meant that the items

passed inspection. Fourth, the defendant's inspection list contains no references to specifications under the ANSI code or any other code except for the word "seal." Fifth, the presence of a seal is a guaranty by the factory where the mobile home was manufactured that it was constructed in accordance with certain requirements.

An inescapable conclusion is that the defendant has changed its positon* from the representation that was made when it asked for a declaratory ruling from the Commissioner of Consumer Protection. Resale Standard #1, whose use the plaintiffs seek to enjoin is, by manner of application as well as in express wordage, not a measuring device to determine safety. Rather, the standard is a flat prohibition against on-site sales of older and usually less expensive homes. On these

points, Guzauskas was candid as shown by the following paraphrases of her testimony: I believe that we are saying that the plaintiffs' mobile home does not meet the ANSI code. On this basis we thank* that the plaintiffs home is unsafe or unsanitary. Parenthetically, prices for mobile homes in Harmony Acres home* ranged from $30,000.00 to above $50,000.00. Putting constitutionality aside for the moment, the court concludes that Resale Standard #1 is a direct contravention of §21-79 (b).

On the question of constitutionality the defendant agrees that the legislature can exempt mobile homes from code requirements. The complaint is that in granting the exemption, the legislature inserted no definitive standard fro* placement. The defendant maintains,

therefore, that §21-79(b) becomes vague in application subject to capricious action by local building inspectors in the issuance of certificates of approval under §21-60a. In addition, the defendant also seems to claim that in placing the burden on the park owner to show that the home is unsafe or unsanitary, the legislature also acted unconstitutionally.

In §21-79 (b), the legislature established a presumption and what, in legal effect, is a "non presumption." A mobile home is presumed to be safe and sanitary on establishing that it was constructed in accordance with any recognized building or construction code or standard. The defendant naturally applauds the presumption. If a further description is required, the court considers the presumption, as written, to be one of law.

Cooke v. Nye, a* Conn. App. 221,227 (1986).

By the express language of §21-79(b) however, the presumption has no negative effect. A failure to establish that a mobile home was constructed in accordance with a nationally recognized code or standard does not automatically presume that the home is unsafe or unsanitary. That determination becomes one of fact. And its factual premise is underscored by the final sentence of subsection (b) which reads that "such shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile home unsafe or unsanitary."

Viewed in proper perspective, the defendant's contentions of unconstitutional infirmaties* because of a lack of stated guidelines or opportunities for capricious

action do not withstand scrutiny. The claimed lack of guidelines is similar to the previous attacdk* on §21-68a where the court held that the building official's ability to determine conditions of safety and sanitation must be considered together with the experience and expertise required of his office. The rejection of the claim of opportunity for capricious action, as a constitutional defect, merits some further explanation.

Where a mobile home connot* be shown to have been constructed in accordance with some nationally recognized code, the home owner's route to show that the home is safe and sanitary obviously is by the procurement of the building official's certificate of approval. But nothing in §21-79, or for that matter in §21-68a, requires the park owner to accept the

building official's opinion. The park owner is able to contest the building official's decision by following the procedure outlined in §21-79 (e) which conceivably could involve the production of contrary expert opinion. In such a situation, the home owner becomes obligated to seek a declaratory ruling from teh* Department of Consumer Protection. The Department's regulations permit informal conferences prior to the issuance of declaratory rulings. Reg. 21a-1-19. In any event, contested cases that might culminate in cease and desist orders require full hearings and are subject to judicial review. Gen. Stat. §4-178, 4-183; See Reg. 21a-1-27.

A much repeated refrain in this memorandum is that statutory sections must be read together and their separate parts

reconciled in order to arrive at a reasonable overall interpretation. Peck v. Jacquemin, supra at 63. An examination of §21-79 (b) and §21-79 (e) demonstrates that the determination of whether a specific used mobile home is in a safe and sanitary condition has not been withdrawn from the fact finding process. The court concludes that, for these reasons, §21-79 is constitutional both as written and as applied.

The defendant has cited no authority for the claim that legislature could not, in a constitutional manner, place the burden of showing that a mobile home is unsafe or unsanitary as has been done in §21-79 (c). Evidentiary devices such as presumptions, inferences and shiftings in the burden of persuasion are common in our adversary system of factfinding and permit

a trier to determine the existence of an ultimate fact from one or more evidentiary facts. County Court of Ulster County v. Allen, 442 U.S. 140,156,99 S. Ct. 2213, 60 d.* Ed.2d 777 (1979).

In line with all that has been said before, subsection (c) is not to be considered alone and in isolation but must be read in conjunction with subsection (e) whereby the park owner must specify in writing the reasons why the mobile home is unsafe or unsanitary. The court knows of no reason why the legislature cannot require the proponent of a position to prove its existence and its ultimate effect. It is only in a criminal case that an evidentiary device cannot be used to curtail the factfinder's freedom to assess the evidence independently in arriving at an ultimate conclusion. County Court of

Ulster County v. Allen, supra; see Holland v. Holland 188 Conn. 354, 359-60 (1982).

V.

Another claim of the defendant is that, as a matter of private contract, the plaintiffs agreed that their mobile home could not be sold on-site after it was ten years old. The basis for this claim is that such a provision was included in the original lease executed on August 29, 1980. But no support, however, for an on-going contractual agreement was furnished by the evidence.

The prohibition against on* on-site sale of a mobile home more than ten years old was a part of the original lease but only to the extent that it was an item in the attached rules and regulations. At the

time, such a provision was permitted by §21-79 (a). The original lease was extended or renewed by yearly written addenda. Attached to each addendum, however, were new rules and regulations and later, due to statutory requirements, new and separate resale standards. Each addendum recited that the attached rules and regulations and the attached resale standards were effective on the commencement date of the new annual term. The ten year provision was included in the rules and regulations effective October 1, 1981 and in the resale standards effective October 1, 1982 but was omitted from the resale standards effective on October 1, 1983.

The omission of the ten year provision from the resale standards to take effect on October 2, 1983, was not an

oversight. On that date, the amendments to §21-79 by P.A. 83-389 became effective. The statute, as amended, eliminated the ten year provision as a permissable* restriction for an on-site sale. Further the claim is an anomaly in the light of Lucille Guzauskas* testimony that the ten year provision was dropped from the resale standards when the statute prohibited its inclusion.

VI.

Despite the defendant's insistence, paragraph 9 of the supplemental judgment in the case of Liberty Mobilehome Sales, Inc. v. Town of Prospect does not require a zoning permit as a condition precedent to a mobile home owner's on-site sale of his home. The requirement of a zoning permit is contained in paragraph 5 of that

judgment and applies only to instances of "siting" or "resiting" as defined therein. An on-site sale of the plaintiff's home was neither a "siting" nor a "resiting". Both paragraphs are quoted at p.16 ante.

What paragraph 9 of the supplemental judgment does require is that home owners in Harmony Acres obtain a building permit and a certificate of occupancy prior to a resale of their homes. Assuming arguendo that these requirements were binding on the plaintiffs, they were satisfied in the course of the trial by the production of a valid certificate of occupancy and, subsequently, a building permit and the statutory certificate of approval. The delayed production does not affect the prayer for injunctive relief. As an equitable remedy, an injunction is necessarily prospective in operation.

Insofar as the plaintiff's entitlement to an injunction is concerned, the question is governed by the situation as developed at trial. Loew's Enterprises Inc. v. international* Alliance of T.S.E., 127 Conn. 415, 418-19 (1941).

If the issue of a building permit/certificate of occupancy had not been mooted at trial, see Waterbury Hospital v. Connecticut Health Care Associates, 186 Conn. 247,252 (1982), the court would be obliged to give serious thought to the plaintiff's claim that the supplemental judgment is not binding on them for the reasons set forth below. The gravamen of the plaintiffs' claims is that although the judgment purports to impose obligations on them, they were not parties to it and were not given notice and an opportunity to be heard.

A final judgment on the merits of a cause is binding on the parties thereto and their privies. Gagne v. Norton, 189 Conn. 29,32 (1983). Recently, our Supreme Court has said that while the concept of provity* is difficult to define, a key consideration for its existence is the sharing of the same legal right by the parties in privity. State v. Fritz, 20 Conn. 156,173 (1987). The reason for the so-called "key consideration" is to insure that the party against whom res judicata is claimed has been adaquetely* represented by his purported privy at the initial trial. BTC Leasing, Inc. v. Martin, 685 S.W. 2d 191,198 (Ky. app. 1984), cited in State v. Fritz, supra.

One traditional way of establishing privity is through privity of estate. But

for privity of estate to operate, the privy must be a subsequent grantee or lessee. National Lead Co. v. Nulsen, 131 F. 2d 51, 56 (8th Cir. 1942), cert. denied 318 U.S. 758, 63 S. Ct. 533, 87 L. Ed. 1131 (1943). When the supplemental judgment was rendered in Liberty Mobilehome Sales, Inc. v. Town of Prospect on September 23, 1982, the plaintiffs were lessees under an existing lease.

The supplemental judgment in Liberty Mobilehome Sales, Inc. v. Town of Prospect differed from the original judgment in that the latter imposed permit requirements for resale on individual mobile home owners which requirements are not recognized by state law. In the absence of privity, such persons, as a matter of due process, would be entitled to notice and a meaningful opportunity to be heard if their property

rights were affected. Kukanskis v. Griffith, 180 Conn. 501, 509-510 (1980). A meaningful opportunity to be heard means a hearing of some sort and not an after-the-fact notification. Roundhouse Construction Corporation v. Telesco Masons Supplies Co., 168 Conn. 371,384 (1975).

The court cannot accept the defendant's assertion that the homeowners' one year leases were only de minimis property rights or rights not within a protectable zone of interest. It seems certain that the affected property right encompasses the owned home as well as the rented space or lot. Otherwise, there would be no reason for statutes such as §21-68a, 21-70 and 21-79. Even month-to-month tenants have been held to be entitled to notice where judicial action affects their property rights. Hite v.

Field, 38 Conn. Sup. 70, 74 (1982). Nor is the situation helped by testimony that the Town looks upon the judgment and supplemental judgment in Liberty Mobilehome Sales Inc. v. Town of Prospect as an informal zoning regulation for the mobile home park. Zoning regulations may be enacted only after a public hearing. Gen. Stat. §8-3.

VII.

In an assemblage of claims, the defendant has asserted several reasons for the denial of equitable relief. Some of these reasons relate to alleged defaults by the Department of Consumer Protection and others to lack of "Clean hands" on the part of the plaintiffs. These contentions are discussed seriatim.

With respect to the Department of Consumer Protection, the chief claim is that the Department violated its own regulations by not giving the defendant a hearing before issuing the declaratory ruling on the plaintiff's request. Admittedly no hearing was held. Under the circumstances, none was required.

Sections 21a-1-10 and 21a-1-19 of the Department's regulations, when read together, provide that prior to the issuance of a declaratory ruling the Department may hold an informal conference for factfinding purposes. The use of the word "may" in a statute or regulation is a clear indication of a discretionary rather than a mandatory duty. Seals v. Hickey, 186 Conn 337,345 (1982). When compared to the defendant's disparagement of the plaintiffs' right to be heard on a judgment

affecting property interests, the claim of entitlement to a hearing before the Department has a hollow ring. But even allowing for due process considerations no hearing or conference was needed. After receipt of the plaintiffs' complaint, the correspondence between the Department and the defendant established that the dispute, in essence, was a question of law. The Department's position, as with the other declaratory rulings and in the contemporaneous contested case, was that the resale standards had not been approved and were not in accord with governing statutes. The defendant's reply was that the resale standards became valid on filing and that the Department had no authority to either approve or disapprove them.

Another intimation is that somehow the declaratory ruling was improper

because, at the time of issuance, the plaintiffs had not secured a proper certificate of occupancy or the statutory certificate of approval. Although this sequence of facts is true, it does not undercut the ruling. Nothing in §21-79 (e) requires that a mobile home owner must possess a certificate of approval under §21-68a before requesting a declaratory ruling from the Commissioner of Consumer Protection on the park owner's objection to an on-site sale. Further, as noted in section VI, ante, the delay in securing a certificate does not, as a matter of general law, affect the plaintiff's right to an equitable remedy. Loew's Enterprises, Inc. v. International Alliance of T.S.E., supra.

With respect to the plaintiffs, the assertions are that their hands were not

clean because of violations of several of the defendant's rules and regulations such as allowing their home to remain vacant for more than thirty days without the defendant's consent, attempting to sublet their home, failing to sign a renewal lease prior to holding over, failing to pay rent from December 1, 1984 to the present and fraudulently misrepresenting the size of their dog. These claims are susceptible to grouping by an enlargement of of* previously found facts.

When the plaintiffs notified the defendant of the prospective purchasers of their home, they were informed that the purchasers would not be permitted to fill our* application forms for residency for the reason that an on-site sale of the home was not allowed. The procedure for determining the suitability for residence

of prospective purchasers is prescribed by §21-79 (d) and was thwarted by the defendant. The plaintiffs* lease of their lot expired on September 30, 1984. Contrary to previous years, a new addendum of extension or renewal was not offered by the defendant. On the expiration of the lease and certainly on February 12, 1985 when the first of several notices to quit was served, the plaintiffs* status became a tenancy at sufferance. Sandrew v. Pequot Drug, Inc., 4 Conn. App. 627,631 (1985). The obligation of a tenant to pay rent, or the obligation of a tenant at sufferance to pay the statutory equivalent of use and occupancy, is conditioned upon a landlord's fulfillment of comparable contractual or statutory responsibilities. Rivera v. Santiago, 4 Conn. App. 608,610 (1984). Under the original lease, and thus by Gen. Stat. §47a-7(a) (6), the supply of

running water was an obligation of the defendant. When the defendant turned off the water, the plaintiff's home became untenantable thereby exusing* duties to pay rent or use and occupancy. Gen. Stat. §47-4a. This court has held that the protection of §47a-4a is available to owners of mobile homes in a mobile home park. Lewis v. Burrows, SPNH 8509-9867 BR (1986) (N.H.H.D.#367) at pp 3-4. It was proved that the plaintiffs' dog was of a size larger than the toy variety expressly permitted. There was insufficient proof however that the dog would objectively be classified as "large" and even less proof of a fraudulent misrepresentation. See J. Frederick Scholes Agency v. Mitchell, 191 Conn. 353,358 (1983).

The doctrine that a petitioner should have "clean hands" has been

described as "a legal euphemism which expresses the principle that where a party comes into equity for relief he must show his conduct has been fair, eqitable* and honest as to the particular controversy in issue." Collens v. New Canaan Water Co., 155 Conn 477,492 (1967). The doctrine is not one of absolutes and its application is within the court's discretion. Cohen v. Cohen, 182 Conn. 193 (1980). As a general rule, the doctrine should not be employed to insulate a party who asserts it from the consequences from the consequences of his own wrongdoings. A & B Auto Salvage, Inc. v. Zoning Board of Appeals, 189 conn* 573,578 (1983).

On the facts, the court finds that the plaintiffs have been honest with the defendant in the pursuit of the statutory right to sell their mobile home. The facts

also demonstrate that due to the defendant's conduct, the plaintiffs owe neither rent nor use and occupancy payments. Moreover, the ultimate permissible sanction for a breach of a park owner's rules or regulations is eviction not a prohibition against sale. See Gen. Stat. §21-80 (2). None of the defendant's "clean hands" theories warrant serious consideration on the propriety of injunctive relief.

VIII.

A final argument against the issuance of an injunction is the defendant's claim that the plaintiffs have an adequate remedy at law in the form of damages. It has often been said that a party seeking equitable relief has the burden of proving irreparable harm and the

lack of an adequate remedy at law. Berin v. Olsen, 183 Conn. 337,340 (1981). In interpreting these prerequisites, the court has the benefit of established precedents.

For a remedy at law to be adequate in the sense that equitable jurisdiction is excluded, the legal remedy must be as complete and beneficial as the relief in equity. Berin v. Olsen, supra at 342, Kloter v. Carabetta Enterprises, Inc., 3 Conn. App 103,105 (1985). In this case, the inadequacy of damages as an exclusive remedy is patent. The plaintiffs seek to enforce a statutory scheme which allows them to sell their mobile home without removing it from the defendant's park. The court has concluded that pertinent resale standards now being enforced by the defendants contravene the statutes and that the statutes are constitutional. Unless

the statutes are enforced by an injunction against the use of the offending standards, further litigation of the same issues is inevitable. Having already lost three purchasers, the plaintiffs should not have to undertake a repetitious law suit if and when a fourth buyer is obtained. A hallmark of equitable jurisprudence is the prevention of multiple suits even though a legal remedy may exist. Berin v. Olsen, supra. In point of fact, however, damages alone can never supply the plaintiffs with an adequate remedy. There is a substantial difference between the on-site and off-site values of the mobile home.

Precedent also provides an answer to the question of irreparable injury. The emphasis, in this regard, is upon the nature of the right affected rather than upon the exact monetary loss sustained.

Patry v. Board of Trustees, 190 Conn. 460,472 (1983). The continuity of the present and threatened future infringement on the plaintiffs' right to sell is, in equitable terms, an irreparable injury. Berin v. Olsen, supra at 342-43; Burroughs Welcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 569,604-05 (1942).

Both of the traditional requirements for equitable intervention have been satisfied. Accordingly, injunctive relief is a proper remedy for the plaintiffs.

IX.

The Connecticut Unfair Trade Practices Act (hereinafter CUTPA), a means chosen by the plaintiff's* for the recovery of damages, grants a cause of action to any party who has suffered an ascertainable

loss in money or property as a result of an unfair or deceptive act in the conduct of any trade or commerce. Gen. Stat. §42-110 g (a). Under the act, trade or commerce includes the sale or rent of real or personal property and the distribution of services. Id. §42-110 a (4). The expressed legislative intent is that CUTPA is a remedial statute and is to be so construed. Id. §42-110 b (d).

The requirement of an "ascertainable loss" is a threshold or standing issue and different from proof of actual damages. Hinchcliffe v. American Motors Corporation, 184 Conn. 607,613-16 (1981). In this case, an ascertainable loss was established upon proof that the defendant's resale standards prevented an on-site sale of the plaintiffs' mobile home.

Whether the resale standards at issue constituted an unfair or deceptive act or practice presents another question of fact. On this issue, our Supreme Court borrowing from federal precedent, as directed by §42-110b (b), has set forth the following three-point criteria: "(1) Whether the practice without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within at least the penumbra of some common law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; and (3) whether it causes substantial injury to consumers." Conaway v. Prestia, 191 Conn. 484, 492 (1983) quoting from FTC v. Sperry & Hutchinson Co., 405 U.S. 230, 244, 92 S. Ct. 893, 31 L.Ed.2d 170 (1972); Sportsmen's

Boating Co. v. Hensley, 192 Conn. 747, 756, (1984); McLaughlin ford, Inc. v. Ford Motor Co., 192 Conn. 558, 568 (1984).

The above-stated three points can be applied independently or in conjunction with each other. All three points need not necessarily co-exist to support a finding of unfairness or deception. A practice may be unfair or deceptive because of the degree that it deviates from one of the three joints or because to a lesser extent it violates all three. McLaughlin Ford, Inc. v. Ford Motor Co., supra at 569 n.15 citing Statement of Basis and Purpose, "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 43 Fed. Reg. 59,614m 59,635 (1978). Whether or not a linkage of the three points is appropriate depemds* upon a particular fact situation. In this

regard, an important consideration is whether or not the practice has caused an unjustified consumer injury. Atlantic Richfield Co. v. Canaan Oil Co., 202 Conn. 234, 242-43 (1987)*

In line with the first point, whether or not the defendant's resale standards offend public policy, this case involves public policy as expressed in the statutes governing the operation of mobile home parks. The court, therefore, is not concerned with the recently expressed caveat that a CUTPA violation cannot rest upon some generalized claim of misconduct that transcends permissible regulatory practices in a specific industry. See Mead v. Burns, 199 Conn. 651, 665-66 (1986). Also, in line with the first point, the plaintiffs have argued that, pursuant to §21-110g (e), the decision of the

Commissioner of Consumer Protection in In the Matter of Liberty Mobilehome *sales, Inc., Docket No 84-158 is prima facie evidence that a CUTPA violation has occurred. Because that contested administrative case is the subject of a still-pending appeal, the court noted at pp25-26, ante, that no special preference could be accorded to the Commissioner's interpretation of the law. Likewise, the Commissioner's interpretation cannot be given prima facie effect in the court's determination of a CUTPA violation.

Instead, the court bases its decision that the first point of the CUTPA criteria has been established upon its own conclusion, as previously stated at p. 26, that the defendant's Resale Standard #1 is in direct contravention with §21-79, a plainly written (and constitutional)

statute. Moreover, it was the defendant's stance on Resale Standard #1 which has caused the substantial "unjustified consumer injury." The plaintiffs, as lessees, are consumers under CUTPA. Resale Standard #1 has prevented the plaintiffs from realizing the market value of their mobilehome on-site despite compliance with §21-79. The third point of the CUTPA criteria, therefore, has also been satisfied.

If further linkage is necessary, see Atlantic Richfield Co. v. Canaan Oil Co., supra at 242, the second and remaining point of the CUTPA criteria has been fulfilled. The defendant acted unethically in offering to aid the plaintiffs in the obtainment of permits required by Resale Standard #16 when its insistence on Resale Standard #1 made any compliance with Resale

Standard #16 an exercise in futility. Further, another illustration of deceptive conduct is revealed when Resale Standard #16 is compared with its stated source, the supplemental judgement* in Liberty Mobilehome Sales, Inc. v. Town of Prospect, No. 106145. Neither the supplemental judgment nor the initial judgment, in that case, refer to the type of improvements to individual mobile homes which Resale Standards #16 establishes* as aesthetic standards for resale. The court does not doubt that the defendant intended the improvements required by Resale Standard #16 to be for the betterment of the park. But such standards cannot be removed from the regulatory authority of the Department of consumer* Protection, e.g. §21-70(c), 21-79(c), by attributing them to an exercise of judicial power.

X.

On concluding that a CUTPA violation has been proved, the court is empowered to award, as requested by the plaintiffs, compensatory and punitive damages, costs and attorney's fees. Gen. Stat. §42-1109 g (a) & (d). The same sections also allow injunctive and other equitable forms of relief. The court has already determined on more traditional grounds that the issuance of injunctive orders is a proper remedy.

For compensatory damages, the plaintiffs request reimbursement for the monies they expended on the mobile home subsequent to October 4, 1984, the date when the defendant refused to allow their first purchaser to register as a resident in the park. These amounts computed at the

daily or monthly rates supplied by the plaintiff's brief to August 31, 1987, the date of judgment are mortgage payments of $4,591.05 and tax payments of $494.09. also* evidence was submitted of payments for electricity and fuel oil after the plaintiffs vacated in the amount of $114.00 and $157.56 respectively. These sums, in total, $5,356.70 are properly allowed as the result of the defendant's wrongful interference with the plaintiffs' statutory right to sell their mobile home. See Blake v. Levy, Inc. v. Hahn, 545 F. Supp. 62, 73 (D. Conn 1982), aff'd 723 F. 2d 895 (2d Cir. 1983).

The specific reference in §42-110g (a) & (d) to punitive damages and attorneys' fees is a departure from the prevailing common law rule whereby punitive damages are limited to the costs of

ligation. See Hinchcliffe v. American Motors Corporation, supra at 617; see Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., 193 Conn. 208,235 & n. 35 (1984). A court is free under §42-110g to award punitive damages on a belief that a measure of deterrence is in order. Bailey Employment System, Inc. v. Hahn, supra at 73. The extent to which punitive damages should be assessed is generally a matter of discretion. Gionfrido v. Avis Rent A Car Systems, Inc., 192 Conn. 280-295 (1984).

Deterrence is called - *for here. To be sure, some of the statutory provisions underlying the plaintiff's CUTPA cause of action are relatively new. But, as stated earlier, §21-79, the pivotal section, is plainly written and the defendant's understanding of it was

reflected by both the defendant's own request for a declaratory ruling and its removal of the provision prohibiting the on-site resale of mobile homes more than ten years old from Resale Standard #1. Also present are some additional factors such as the early - on passing by the plaintiffs' mobile home of the defendant's mandated inspection, the defendant's reference to aesthetic standards for resale as requirements of a court judgment and the intentional disconnection of the water supply. An additional $12,000.00 is awarded as punitive damages.

By affidavit, the plaintiffs* counsel requested an award of $26,730.00 for attorneys' fees and $1,312.35 in disbursed costs, another item for which provision is made by §42-110g (d). At a subsequent hearing on these matters, no objection was made to the itemization of

costs and the only concern expressed as to fees was perhaps double charges had been made for occasions when the plaintiffs' counsel and his associate were together such as court sessions.

In the affidavit, the plaintiffs' counsel reported that he had worked on the case himself for 292.5 hours at an hourly rate of $100.00 and that his associate had worked 72 hours at an hourly rate of $65.00. At the hearing the plaintiffs' counsel reported that his associate had been with him in court for five hours and requested a discount of his invoice accordingly. As amended, the request for attorneys' fees is $26,405.00.

From the express language of §42-110 g (d), attorneys' fees are to be determined on the work reasonably performed. The

accounting of hours by the plaintiffs' counsel for himself and his associate is found to be accurate and the amount of the requested fee to be reasonable. The laywers representing the defendant spent an almost identical amount of time with similar charges.

Without an administrative finding of facts, this case assumed an awesome complexity. The plaintiffs' exhibits ran to double "S" and 69 exhibits were introduced on behalf of the defendant. Given the fact that the Housing Session meets in Waterbury only one day per week, the case took almost one year to try. In addition to hearings at Waterbury, the case was heard in New Haven and Bridgeport with a final session on a Saturday in the Prospect Town Hall. The plaintiffs' recovery is supplemented by $26,405.00 in

attorneys' fees and $1,312.35 in costs.

XI.

Having found the plaintiffs should prevail on their complaint, the court issues the following orders to effectuate it s* judgment.

(1) The defendant, its officers, directors, agents, employees, successors and assigns are permanently enjoined and prohibited from:

(a) Using the plaintiffs' inability to comply with Resale Standard #1 as a reason for the disallowance of an on-site sale of the plaintiffs' mobile home.

(b) Enforcing any permit or certificate requirements as a condition precedent to an on-site sale of the plaintiff's* mobile home except the statutory certificate of approval provided by Gen. Stat. §21-68a.

(c) Enforcing any of the non-permit requirements of Resale Standard #16 as conditions precedent to an on-site sale of the plaintiff's* mobile home unless and until said requirements are approved as bona fide aesthetic standards for resale by the

Department of Consumer Protection.

(d) Refusing to accept applications for residency in Harmony Acres Mobile Home Park.

(e) Rejecting from residency an* prospective purchaser of the plaintiffs' mobile home except for the reasons and within the time limitations provided in Gen. Stat. §21-79 (d).

(f) Prescribing any procedure for determining conditions of safety and sanitation when notified of an on-site sale of the plaintiffs'

mobile home that is other than the procedure set forth in Gen. Stat. §21-79 (e).

(g) Evicting the plaintiffs or their mobile home from the lot on which the mobile home is located so long as the plaintiffs tender the monthly use and occupancy payment hereinafter set forth.

(2) The defendant, its officers, directors, agents, employees successors and assings* are ordered forthwith to restore running water to the plaintiffs' mobile home and are permanently enjoined and prohibited from any further disconnection of the same so long as the plaintiffs

tender a monthly use and occupancy charge in an amount that is commensurate with the defendant's current rental charge for mobile home lots in the section of the park wherein the plaintiff's* mobile home is located. The tender of the plaintiffs first payment for use and occupancy shall be due ten days after the water service is restored and monthly thereafter. All tenders may be by personal check. In the absence of information as to the current rental charge, the plaintiffs' tenders shall be in an amount equivalent to their last rental payment.

(3) Within thirty days from the

judgment, the defendant is ordered to pay to the plaintiffs the following sums: $5,356.70 for compensatory damages, $12,000.00 for punitive damages, $1,312.35 for disbursed costs and $26,405.00 for attorneys' fees. In addition, the plaintiffs are entitled to taxable costs.

(4) Judgment is entered for the plaintiffs on the defendant's counterclaim.

/s/ Jerrold H. Barnett ,J.

Jerrold H. Barnett

CHIEF CLERK
SUPREME COURT
APPELLATE COURT
JANUARY 12 9:09 a.m. '88

STATE OF CONNECTICUT

STEPHEN EAMIELLO OF NAUGATUCK, CONNECTICUT	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT
RITA LANG EAMIELLO OF NAUGATUCK, CONNECTICUT	:	OF WATERBURY AT
VS.	:	HOUSING SESSION
LIBERTY MOBILEHOME SALES, INC.	:	
BY SERVICE UPON ITS AGENT FOR SERVICE,	:	
MARTIN F. GUZAUSKAS OF PLAINVILLE,	:	
CONNECTICUT	:	AUGUST 31, 1986

Present: The Honorable Jerrold H. Barnett, Judge

This action, by writ and complaint, claiming monetary damages came to this Court on April 9, 1985, and thence to the present time, when the parties appeared and were at issue to the Court as on file.

The Court, having heard the parties, finds the issues for the plaintiff on the

complaint and for the plaintiff on the defendant's counterclaim.

Whereupon it is adjudged that the plaintiff recover of the defendant thirty days after judgment $5,356.70 compensatory damages, $12,000.00 punitive damages, $1,312.35 for disbursed costs and $26,405.00 for attorneys' fees and costs, taxed at _____.

The following orders are also issued by the Court to effectuate its judgment:

(1) The defendant, its officers, directors, agents, employees, successors and assigns are permanently enjoined and prohibited from:

(a) Using the plaintiffs' inability to comply with

Resale Standard #1 as a reason for the disallowance of an on-site sale of the plaintiffs' mobile home.

(b) Enforcing any permit or certificate requirements as a condition precedent to an on-site sale of the plaintiff's mobile home except the statutory certificate of approval provided by Gen. Stat. §21-68a.

(c) Enforcing any of the non-permit requirements of Resale Standard #16 as conditions precedent to an on-site sale of the plaintiff's mobile home

unless and until said requirements are approved as bona fide aesthetic standards for resale by the Department of Consumer Protection.

(d) Refusing to accept applications for residency in Harmony Acres Mobile Home Park.

(e) Rejecting from residency any prospective purchaser of the plaintiffs' mobile home except for the reasons and within the time limitation provided in Gen. Stat. §21-79 (d).

(f) Prescribing any procedure

for determining conditions of safety and sanitation when notified of an on-site sale of the plaintiffs' mobile home that is other than the procedure set forth in Gen. Stat. §21-79 (e).

(g) Evicting the plaintiffs or their mobile home from the lot on which the mobile home is located so long as the plaintiffs tender the monthly use and occupancy payment hereinafter set forth.

(2) The defendant, its officers, directors, agents, employees, successors and assigns are

ordered forthwith restore running water to the plaintiffs' mobile home and are permanently enjoined and prohibited from any further disconnection of the same so long as the plaintiffs tender a monthly use and occupancy change* in an amount that is commensurate with the defendant's current rental charge for mobile home lots in the section of the park wherein the plaintiff's mobile home is located. The tender of the plaintiffs first payment for use and occupancy shall be due ten days after the water service is restored and monthly thereafter. All tenders may be by personal check. In the absence of information as to the

current rental charge, the plaintiffs' tenders shall be in an amount equivalent to their last rental payment.

By the Court, (Barnett, J.)

/s/ Dana M. Guiliano

Dana M. Guiliano

Clerk, Housing Session

IN THE SUPREME COURT OF THE
STATE OF CONNECTICUT

NO. 13310

LIBERTY MOBILEHOME
SALES, INC.,)
)
Petitioner,)
v.)
STEPHEN FAMIELLO, et al,)
Respondents.)
)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that LIBERTY MOBILEHOME SALES, INC., the Petitioner above named, hereby appeals to the Supreme Court of the United States from the final order of the Connecticut Supreme Court entered herein on August 16, 1988.

This appeal is taken pursuant to 28

U.S.C. §1257.

PETITIONER

By_____
DEAN B. KILBOURNE and

_____
RICHARD M. PORTER
Attorneys for Petitioner
Rogin, Nassau, Caplan, Lassman
and Hirtle
CityPlace
Hartford, CT 06103-3460
(203) 278-7480

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-960 (3)

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

LIBERTY MOBILEHOME SALES, INC.,
Appellant,

v.

STEPHEN EAMIELLO, ET UX.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

Attorney for Appellee:

EDWARD G. FITZPATRICK, ESQ.
175 Church Street
Naugatuck, Connecticut 06770
Tel: (203) 729-4555

Counsel of Record

QUESTION PRESENTED

Whether the Connecticut Supreme Court correctly held that statutory modification of the common law right of a landlord to absolute control over the term of the lease and the identity of the tenant does not constitute a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED

TABLE OF AUTHORITIES ii

STATE STATUTES INVOLVED 2

ARGUMENT 4

THE APPEAL WAS NOT TIMELY FILED 4

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION 4

The Decision Below Does Not Conflict With This Court's Decision In *Loretto v. Teleprompter Manhattan CATV Corp.* 4

The Decision Below Does Not Conflict With *Hall v. City of Santa Barbara* 10

The Mobile Home Act Is Well Within The Legitimate Police Power 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: **Page(s)**

Armstrong v. United States, 314 U.S. 40, 80 S.Ct. 1563 (1960) 13

Ballstaedt v. Amoco Oil Co., 509 F. Supp. 1095 (N.D. Iowa 1981) 8

Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458 (1921) 8, 9, 14

Connolly v. Pension Benefit Guaranty Corp., 106 S.Ct. 1018 (1986) 13

Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1980) ..... *passim*

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289 (1921) 9

Edgewater Inv. Ass'n v. Borough of Edgewater, 493 A.2d 11 (N.J. Super. App. Div. 1985), *aff'd*, 510 A.2d 117 (N.J. 1986) 6

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S.Ct. 2207 (1978) 14

F.C.C. v. Florida Power Corp., 107 S.Ct. 1107 (1987) 5, 7

Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, 104 S.Ct. 218 (1983) 5, 8, 10

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1120 (1988) 10, 11, 12

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984) 14

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348 (1964) 10

Help Hoboken Housing v. City of Hoboken, 650 F. Supp. 793 (D.N.J. 1986) 6

Hilton Washington Corp. v. District of Columbia, 777 F.2d 47 (D.C. Cir. 1985) 8, 10

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982) . . . . . *passim*

Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465 (1921) 9

Matter of Review of Health Care Admin., 415 A.2d 1147 (N.J.) *cert. denied*, 449 U.S. 944, 101 S.Ct. 342 (1980) 8

Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare, 742 F.2d 442 (8th Cir. 1984) *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191 (1985) 8

Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987) 6

Pennell v. City of San Jose, 108 S.Ct. 849 (1988) 5, 12, 14

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980) 10

Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984) 5

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

State of Louisiana, ex rel. Allen v. Walker, 365 U.S. 567, 81 S.Ct. 755 (1961) 4

Swann v. Gastonia Housing Authority, 675 F.2d 1342 (4th Cir. 1982) 8

Taggart v. New York, 392 U.S. 667, 88 S.Ct. 2317 (1968) 4

Territo v. United States, 358 U.S. 279, 79 S.Ct. 312 (1959) 4

Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F. Supp. 304 (N.D.N.Y. 1984) 6, 10

Troy Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984) . 5, 8, 9, 10

Statutes:

Conn. Gen. Stat. § 21-64 2

Conn. Gen. Stat. § 21-79 . . . . . 2, 3, 4, 8, 13

Conn. Gen. Stat. § 21-79(a) 2, 7

Conn. Gen. Stat. § 21-79(b) 2

Conn. Gen. Stat. § 21-79(d) 2, 7, 9

Conn. Gen. Stat. § 21-80(b) 2, 9

Conn. Gen. Stat. § 21-80(b)(1) 2

Conn. Gen. Stat. § 21-80(b)(1)(A) 2

Conn. Gen. Stat. § 21-80(b)(1)(B) 2

Conn. Gen. Stat. § 21-80(b)(1)(C) 2, 8

Conn. Gen. Stat. § 21-80(b)(1)(D) 2

Conn. Gen. Stat. § 21-80(b)(1)(E) 2, 8

No. 88-960

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

LIBERTY MOBILEHOME SALES, INC.,
Appellant,

v.

STEPHEN EAMIELLO, ET UX.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellee, Stephen Eamiello, moves the Court to dismiss the appeal filed on behalf of the appellant Liberty Mobilehome Sales, Inc., or in the alternative, to affirm the judgment of the Supreme Court of Connecticut on the grounds that:

1. The appeal was not timely filed; and

2. It is manifest that the questions raised are so unsubstantial as not to need further argument.

STATE STATUTES INVOLVED

This appeal involves certain sections of the Connecticut Mobile Manufactured Homes and Mobile Manufactured Home Parks, Owners and Residents Act, Conn. Gen. Stat. §§ 21-64 *et seq.* (the "Mobile Home Act").

Conn. Gen. Stat. § 21-80(b)(1) regulates eviction of tenants who own their mobile homes and rent space from the park owner. The landlord may evict for cause, including: nonpayment of rent; material noncompliance with the tenant's statutory obligations; material noncompliance with the rental agreement and the landlord's rules and regulations. Conn. Gen. Stat. §§ 21-80(b)(1)(A), (B) and (C).

Further, the landlord may evict for two reasons unrelated to tenant misconduct. Where the tenant fails to agree to a proposed rent increase, the landlord may evict upon expiration of the term of the existing rental agreement. Conn. Gen. Stat. § 21-80(b)(1)(D). Where the landlord desires to cease use of his property as a mobile home park and put it to other use, he may do so and evict the tenant upon a one year notice. Conn. Gen. Stat. § 21-80(b)(1)(E).

Conn. Gen. Stat. § 21-79 regulates the tenant's right to sell the mobile home in the mobile home park, and the landlord's right to approve such sale. Section 21-79(a) permits the tenant to sell his mobile home within the park upon the conditions that the mobile home is safe, sanitary, in conformance with aesthetic standards of the park, and that the purchaser be bound by any rental agreement of the seller-tenant and rules and regulations of the park. Section 21-79(b) allows the landlord to approve or disapprove the condition of the mobile home for resale within the park.

Section 21-79(d) permits the purchaser of an approved mobile home to become a resident of the park, upon the condition that he meets the landlord's entry requirements and the landlord approves the entry. The landlord may refuse

entry upon reasonable belief that the purchaser will use the mobile home for illegal or immoral purposes, will disturb the quiet enjoyment of other tenants, or will be financially unable to pay rent.

Nothing in section 21-79 allows the tenant or purchaser to replace an existing mobile home by locating a different mobile home in the park without the landlord's consent.

ARGUMENT

THE APPEAL WAS NOT TIMELY FILED

The judgment below was entered on August 16, 1988, by the Connecticut Supreme Court. Appellant filed its Notice of Appeal in the Connecticut Supreme Court on November 17, 1988, more than ninety days after entry of the judgment below. (See certification of Administrative Assistant to the Connecticut Supreme Court submitted under separate cover.) An appeal is timely only when filed with the Court from whose judgment the appeal is taken within the time allowed by law. 28 U.S.C. § 2101(c); Sup. Ct. R. 10.3, 11.2. Failure to timely file the appeal deprives the Court of jurisdiction. *Taggart v. New York*, 392 U.S. 667, 88 S.Ct. 2317 (1968); *State of Louisiana ex rel. Allen v. Walker*, 365 U.S. 567, 81 S.Ct. 755 (1961); *Territo v. United States*, 358 U.S. 279, 79 S.Ct. 312 (1959); Sup. Ct. R. 12.1. The appeal should therefore be dismisssed.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

The Decision Below Does Not Conflict With This Court's Decision In *Loretto v. Teleprompter Manhattan CATV Corp.*

Appellant contends that a *per se* taking analysis should apply to the Connecticut Mobile Home Act. However, after a lengthy analysis of the extant Supreme Court authority, the Connecticut Supreme Court held:

> We conclude that § 21-79 as applied to the facts of this case does not involve the actual physical occupation of land for a public purpose, but merely regulates the use to which private property may be put.

Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 645, 546 A.2d 805, 818 (1988). The Connecticut Supreme Court correctly applied a multifactor balancing test to the Connecticut statutory scheme regulating the relations between mobile home landlords and tenants, and rejected application of the *per se* rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982).

Loretto has no application to this case. The *Loretto* Court itself acknowledged that its holding "is very narrow," 458 U.S. at 441, 102 S.Ct. at 3179, and stated that: "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 458 U.S. at 440, 102 S.Ct. at 3178. *Accord Pennell v. City of San Jose*, 108 S.Ct. 849, 857–58 n.6 (1988); *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1112 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983).

Appellant's attempt to limit the application of *F.C.C. v. Florida Power Corp.* to rate regulation ignores the specific language of the Court that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." 107 S.Ct. at 1112. The Connecticut decision is consistent with those of virtually every court since *Loretto* considering constitutional challenges similar to that made by appellant in finding that statutes regulating relations of landlords and tenants are not *per se* takings and, indeed, not takings at all. *See, e.g., Pennell v. City of San Jose*, 108 S.Ct. 849, 857–58, n.6 (1988); *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1112 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983); *Sadowsky v. City of New York*, 732 F.2d 312, 317 (2d Cir. 1984) (testing landlord-tenant regulation by the "multi-factor inquiry generally applicable to non-possessory governmental activity."); *Troy Ltd. v. Renna*, 727 F.2d 287, 302 (3d Cir. 1984) (statutory protection from eviction for certain tenants for forty years after conversion of apartments to condominiums, and eliminating eviction based

upon lapse of time); *Help Hoboken Housing v. City of Hoboken, N.J.*, 650 F. Supp. 793, 798 (D.N.J. 1986) (ordinance requiring landlords to rent vacant apartments to paying tenants); *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 592 F. Supp. 304, 311 (N.D.N.Y. 1984) (statute allowing government agency to exercise preferential right of leasing motel and hotel rooms and to establish rates); *Edgewater Inv. Ass'n v. Borough of Edgewater*, 493 A.2d 11, 18 (N.J. Super. App. Div. 1985), *aff'd*, 510 A.2d 1178 (N.J. 1986) (statutory protections for class of tenants from conversion of rental apartments to condominiums).[1]

Even if one were to ignore the direct self-limiting words of *Loretto* and the action of the courts in rejecting application of *Loretto* to landlord-tenant relationships, the *Loretto* analysis is not properly applied to this case.

The adjustment of landlord-tenant rights by the Mobile Home Act is markedly different than the physical invasion analyzed in *Loretto* in several respects. The park landlord has *voluntarily* transferred the rights to possess and use the property to his tenant. The Mobile Home Act produces no physical invasion of the premises by persons other than tenants who were within the reasonable contemplation of the landlord who opened his park to the tenants. *Eamiello*, 208 Conn. at 642–43, 546 A.2d at 816–17.

The mobile home park owner suffers no invasion by a stranger, but by a tenant with whom he has voluntarily negotiated a rental agreement. The Mobile Home Act allows the landlord a large degree of control over the timing, extent and nature of the initial invasion. He can unilaterally elect

---

[1] This Court has limited broad application of a *Loretto* analysis in other types of regulation as well. In *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987), the Court noted that even a "permanent grant of continuous access" would *not* be a taking if it were a condition to a permit and designed to achieve the same goal as an outright permit denial. *Id.* at 3148. Thus, not all "permanent physical occupations" within the *Loretto* meaning are *per se* takings.

not to rent to a given tenant or to accept a given mobile home into the park, or even to rent a lot at all.

The landlord has a large degree of control over the subsequent purchaser's tenancy as well. Because the purchaser-tenant assumes the rights and obligations of the seller-tenant's rental agreement, and is bound by the park rules and regulations, the landlord has significant control over the timing, extent, and nature of the invasion by the purchaser-tenant.[2]

This Court, in *F.C.C. v. Florida Power Corp.*, specifically found that in a taking analysis there is an "unambiguous distinction between a commercial lessee and an interloper with a government license." 107 S.Ct. at 1112.

The Mobile Home Act is similar to the pole attachment statute at issue in *Florida Power.* As the Connecticut Supreme Court observed in *Eamiello*, a primary legislative purpose of the Mobile Home Act is the preservation of the tenant's financial investment in his mobile home. 208 Conn. at 648. Prior to the Act, landlords would often agree only to short term leases and then evict tenants, resulting in a sale of the mobile home to the landlord at distress prices. *Id.* Likewise, in response to complaints that commercial landlords were exploiting their monopoly position by engaging in widespread overcharging, Congress enacted the statutory and regulatory scheme challenged in *F.C.C. v. Florida Power Corp.*, 107 S.Ct. at 1110. The Court held that such economic regulation is a restriction on the use of property and not a physical occupation within the meaning of *Loretto*, emphasizing that the regulatory scheme became operative only after the landlord

---

[2] *See*, Conn. Gen. Stat. §§ 21-79(a) and (d).

had affirmatively and voluntarily entered into a rental agreement.[3]

This case is also materially different than *Loretto* in the impact on the landlord's ability to dispose of his property. Section 21-80(b)(1)(E) allows the landlord to evict the tenant if he elects to change the use of his property. Thus, the landlord may dispose of his property, free and clear of any tenancy rights. Moreover, unlike *Loretto*, the mobile park owner may sell his land subject to the statutory tenancies and receive full value since the tenancy is a direct value to the owner.

This case is further distinguished from *Loretto* in that the restriction of a landlord's rights is not permanent in the same sense. The Mobile Home Act permits the park owner to evict a tenant for several reasons. Conn. Gen. Stat. § 21-80(b).

By allowing the particular occupant of the mobile home to change, section 21-79 does not alter or expand the character, nature, extent or duration of the physical invasion created

---

[3] Numerous examples exist where those voluntarily engaging in a regulated business or industry are subject to regulations extending their obligations which are not takings of property, *per se* or otherwise. *See e.g., Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983) (rent control, elimination of eviction based upon lapse of time, government permission required to remove property from rental market); *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458 (1921) (restriction on evicting holdover tenants); *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985) (where hotel establishes taxicab stand, it cannot exclude any licensed taxicab); *Minnesota Ass'n. of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191 (1985) (nursing home operators who accept medicaid patients are subject to rate setting for private pay patients); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984) (statutory tenancies after expiration of lease); *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982) (landlord who rents to federally subsidized § 8 tenants prohibited from evicting without cause upon expiration of § 8 lease); *Ballstaedt v. Amoco Oil Co.*, 509 F. Supp. 1095 (N.D. Iowa 1981) (required renewal of franchise absent good cause for termination); *Matter of Review of Health Care Admin.*, 415 A.2d 1147 (N.J. 1980), *cert. denied*, 449 U.S. 944, 101 S.Ct. 342 (1980) (nursing home operators required to make beds available to indigent patients).

by the initial placement of the mobile home within the park for the useful life of the mobile home, or until the tenant commits cause for eviction.[4]

Loretto specifically noted that its holding does not apply to leasehold extensions, citing *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 246–48, 42 S.Ct. 289, 291–92 (1922) and *Block v. Hirsh*, 256 U.S. 135, 153–58, 41 S.Ct. 459–60 (1921); 458 U.S. at 440, 102 S.Ct. at 3178. *See also, Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465 (1921); *Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3d Cir. 1984). The Mobile Home Act's allowing a tenant to transfer the benefits of leasehold extensions to a subsequent purchaser in no way transmutes this case into a *per se* taking.

> The additional right to transfer to a mobile home purchaser the right to continued occupancy of the site, subject to rejection of the transferee for good cause as provided in § 21-79(d), is quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. Such a statutorily required condition of a lease agreement similarly does not amount to a taking of property for a use never consented to by the owner, as in *Loretto*.

Eamiello, 208 Conn. at 646, 546 A.2d at 818. If the underlying tenancy restrictions are not *per se* takings, the transfer of the rights of tenancy to a subsequent purchaser of the mobile home alters only the particular tenant who will enjoy those rights. It does not alter or expand the restrictions of the park owner's rights to use, possess and dispose of its property.

---

[4] Section 21-80(b) creates no right in the tenant to replace a mobile home he has physically located within the park with any other mobile home, absent the landlord's consent. This statute prevents eviction based upon lapse of time only for the duration of the useful life of the mobile home.

Thus, when distilled to its essence, appellant's real complaint is that, having chosen to use its property for mobile home tenancy, it is deprived of the unfettered ability to choose and exclude *particular* tenants. It is well settled that a landlord has no "right" to select its tenants as he sees fit, free from governmental regulation. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 259, 85 S.Ct. 348, 358 (1964), *cited by Loretto,* 458 U.S. at 440, 1025 S.Ct. at 3178. The restriction of this "right" does not constitute a taking. *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.,* 592 F. Supp. 304, 314 n.7 (N.D.N.Y. 1984). *See, Fresh Pond Shopping Center, Inc. v. Callahan,* 104 S.Ct. 218 (1983); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 82–83, 100 S.Ct. 2035, 2041–42 (1980); *Hilton Washington Corp. v. District of Columbia,* 777 F.2d 47 (D.C. Cir. 1985); *Troy Ltd. v. Renna,* 727 F.2d 287 (3d Cir. 1984). This limited restriction on the bundle of property rights does not create a "physical occupation" of the type characterized as *per se* by *Loretto.*

Thus, the Connecticut Supreme Court correctly held that the Mobile Home Act's "modification of the common law right of the lessor to absolute control of the term of the lease and the identity of his lessee . . . is not sufficiently analogous to a physical occupation of property" as in *Loretto. Eamiello,* 208 Conn. at 641, 546 A.2d at 816. Under such circumstances, a *per se* taking analysis is wholly inappropriate.

The Decision Below Does Not Conflict With *Hall v. City of Santa Barbara.*

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), *cert. denied,* 108 S.Ct. 1120 (1988), is inapposite, and does not broaden the *per se* taking rule of *Loretto* to apply to the Connecticut Statutes.

Hall does not attempt to decide the issues presented in this case. The Court emphasized that: "[W]e cannot and do not express any view as to whether the Santa Barbara

ordinance constitutes a taking. We hold only that . . . it *may*." 833 F.2d at 1282 (emphasis added). *Hall*, thus, is not intended to be that panel's final analysis of the taking issue.

To the extent *Hall* expresses opinions about the impact of the Santa Barbara regulatory scheme, it is inapposite. At issue in *Hall* was the impact of a rent control ordinance coupled with statutory tenancies. The *Hall* plaintiffs claimed that the rent control overlay took an economic value away from them and gave it to the tenants. The claim was that a tenant had the right to sell his tenancy at a premium reflecting the below-market rental rate, and achieve the economic value that was being denied to the landlord by rent control. In this circumstance, plaintiffs complained of "the transfer of a valuable property right to occupy mobile home parks at below-market rates." 833 F.2d at 1274. The transfer to the tenant of this salable economic value denied to the landlord by rent control was "crucial" to the *Hall* opinion. 833 F.2d at 1279.

By contrast, the Connecticut Mobile Home Act does not transfer to the tenant the economic value of a right denied to the landlord. The Connecticut Act has no below-market value rent control provisions. The landlord is free to extract its economic due for its property interest by way of rent. What the Mobile Home Act does is prevent the transfer of the tenant's investment in his mobile home to the landlord by virtue of the landlord's economic dominance. In other words, the Mobile Home Act does not take the landlord's property, but rather, prevents the landlord from taking the tenant's property. *Hall* is thus inapposite.

Furthermore, *Hall's* efficacy is questionable. Three other members of the Ninth Circuit, dissenting from the denial of rehearing *en banc*, found the *Hall* analysis "contrary to controlling authority." 833 F.2d at 1282 (Schroeder, J., dissenting from denial of *en banc* rehearing). The dissenting panel found further that the *Hall* decision was "antithetical to the reasoning of *Loretto*," 833 F.2d at 1283, and attacked the

opinion for encouraging "the very 'dire consequences' that the [Supreme] Court intended to avoid in *Loretto*" when it held that the *Loretto* rationale did not apply to adjustments of the landlord-tenant relationship. 833 F.2d at 1284, *citing Loretto*, 458 U.S. at 440, 102 S.Ct. at 3178. The efficacy of *Hall's* holding that the ordinances "seem to present a claim for taking by physical possession, as in *Loretto*," 833 F.2d at 1276, is further undermined by *Pennell v. City of San Jose*, 108 S.Ct. 849, 857-58 n.6 (1988), in which the Supreme Court made clear that regulation of the economic relations of landlords and tenants is not a *per se* taking under *Loretto*.

Hall's inapposite facts, tentative conclusions and questioned authority cannot be read to create a conflict in authority with the decision of the Connecticut Supreme Court.

The Mobile Home Act Is Well Within The Legitimate Police Power.

The appellant claims that the Connecticut Supreme Court failed to determine whether the Mobile Home Act substantially advances legitimate state interests. Appellant does *not* take issue with the Court below's balancing of the Act's purpose against the economic harm caused to appellant by operation of the Act. Rather, appellant's sole basis for disagreement with the Connecticut Supreme Court's balancing test is appellant's claim that the Mobile Home Act is not within the legitimate police power of the State of Connecticut. However, the opinion below details the legislative history that demonstrates that the Mobile Home Act "serves a substantial public purpose." *Eamiello*, 208 Conn. at 648, 546 A.2d at 819.

The Connecticut Supreme Court noted that due to municipal zoning ordinances enacted state-wide, mobile home park owners have achieved a fortuitous monopoly and that "throughout society monopolies often result in abuses." *Eamiello*, 208 Conn. at 647, 546 A.2d at 819. The Court

below recounted the various legislative studies that formed the basis for enactment of the Mobile Home Act, citing the most recent (1983) study's finding that prohibitions of on-site resale "prohibits [mobile home] owners from obtaining equity from their housing investment." *Eamiello*, 208 Conn. at 648, 546 A.2d at 819. The Connecticut Supreme Court found that "[s]ection 21-79 of the Mobile Home Act protects tenants at mobile home parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase more expensive housing." *Eamiello*, 208 Conn. at 648, 546 A.2d at 819. The Court below held that "in choosing the tenant rather than the mobile home park operator as the recipient of the economic advantage arising from the near-monopoly status of the industry, the legislature, by allotting its benefit to those who generally are more in need has not violated any constitutional principle." *Eamiello*, 208 Conn. at 649, 546 A.2d at 820.

The Mobile Home Act thus serves a substantial public purpose. Moreover, the Act does not achieve its objective unfairly to the appellant.

The character of the governmental action only becomes a factor which tips in favor of establishing a taking when the action "forc[es] some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1027 (1986), *quoting Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960). However, when a person has voluntarily entered a business and receives the economic benefit thereof, "fairness and justice" do not require the public, rather than the business person, to shoulder protections afforded the business person's customer to prevent over-reaching. *See Connolly v. Pension Benefit Guaranty Corp.*, 1106 S.Ct. at 1026-27.

Thus, the Mobile Home Act recognizes that tenants of mobile home parks who have a sizeable investment in mobile homes require protection from economically dominant park

owners who would otherwise usurp the tenants' investments. The Mobile Home Act is designed to render to the park owner his economic due by way of rent, but to prevent the park owner from reaching too far into the tenant's pocketbook. In addition, the Act provides regulatory oversight of mobile home parks. Such regulatory adjustment of economic benefits and burdens is squarely within the legitimate police power of the state, and no serious federal question regarding the police power exists. *See Pennell v. City of San Jose,* 108 S.Ct. 849, 858 (1988); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241–42, 104 S.Ct. 2321, 2330 (1984); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124–25, 98 S.Ct. 2207, 2213 (1978); *Block v. Hirsh,* 256 U.S. 135, 154–56, 41 S.Ct. 458, 459 (1921).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal because it was not timely filed, and for want of a substantial question, or, in the alternative, summarily affirm.

Respectfully submitted,

EDWARD G. FITZPATRICK, ESQ.
175 Church Street
Suite 301
Naugatuck, Connecticut 06770
Tel: (203) 729-4555

Attorney for Appellee

88-960

FILED
JAN 24 1989
JOSEPH E. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

LIBERTY MOBILEHOME SALES, INC.,
Appellant,

v.

STEPHEN EAMIELLO, *et ux.*,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

ROBERT L. HIRTLE, JR., ESQ.
Counsel of Record
RICHARD M. PORTER, ESQ.
DEAN B. KILBOURNE, ESQ.
ROGIN, NASSAU, CAPLAN,
LASSMAN & HIRTLE
CityPlace
Hartford, CT 06103
203/278-7480
Attorneys for Appellant

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

TABLE OF CONTENTS

		PAGE
I.	TABLE OF AUTHORITIES.....	-ii-
II.	ARGUMENT.....	-1-
	A. The Appeal Was Timely Filed and the Court Does Have Jurisdiction..	-1-
	B. The Appeal Presents A Substantial Federal Question.....	-4-
	1. The Decision Below Conflicts With this Court's Decision in Loretto v. Teleprompter Manhattan CATV.	-4-
	2. The Decision Below Conflicts With Hall v. City of Santa Barbara.	-10-
	3. The Decision Below Conflicts With This Court's Decision in Nollan v. California Coastal Comm'n.	-13-
III.	CONCLUSION.....	-16-

TABLE OF AUTHORITIES

	PAGE
Agins v. Tiburon, 447 U.S. 255 (1980)	13
F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987)	9
Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), reh denied, 833 F.2d 1282 (9th Cir. 1987), cert denied, U.S. , 108 S.Ct. 1120, (1988)	10,11
Heflin v. United States, 357 U.S. 415 (1959)	3,4
Liberty Mobilehome Sales, Inc. v. Eamiello, 208 Conn. 648, 546 A.2d 805 (1988)	14
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	4,9
Nollan v. California Coastal Comm'n, U.S. , 107 S.Ct. 3141 (1987)	13
Parker v. Levy, 417 U.S. 740 (1974)	3,4
Pennell v. City of San Jose, U.S. , 108 S.Ct. 849 (1988)	14
Taglianetti v. United States, 394 U.S. 316 (1969)	3,4

	PAGE
Territo v. United States, 358 U.S. 279 (1959).....	3
Thompson v. Merlino Enterprises, Inc., 208 Conn. 656 (1988).....	6
Conn. Gen. Stat §21-79.....	6

Pursuant to Rule 16.5, the appellant, Liberty Mobilehome Sales, Inc., opposes the motion to dismiss or affirm filed by the appellees, Stephen Eamiello, et ux.

ARGUMENT

A. The Appeal Was Timely Filed and the Court Does Have Jurisdiction

The judgment below was entered on August 16, 1988 by the Connecticut Supreme Court, and the appeal to this Court was timely filed.

Within ninety days, on November 14, 1988, the Jurisdictional Statement and Appendix were filed in the Supreme Court of the United States, and three copies were mailed first class, postage prepaid, to Edward G. Fitzpatrick, Esq., and Robert M. Langer, Assistant Attorney General.

On November 14, 1988, the Notice

of Appeal was filed in Hartford Superior Court. Although the caption read "In the Supreme Court of the State of Connecticut," and the appellant's messenger was directed to deliver the Notice to the Connecticut Supreme Court, he inadvertently delivered the Notice to the Superior Court where it was time-stamped for November 14, 1988. (Said date is stamped on the bottom of the "Notice.") When the Superior Court clerk realized the Notice was filed in the wrong court, he transferred it to the Connecticut Supreme Court. The Notice reached that court on November 17, 1988.

The appellees had actual notice of the appeal on November 14, 1988, when they received the jurisdictional statement, the appendix, and a copy of the Notice.

Even if the Notice was not

considered to be filed until November 17, 1988, it would not be a jurisdictional defect, Heflin v. United States, 357 U.S. 415 (1959), and the court could exercise discretion to consider the case. Taglianetti v. United States, 394 U.S. 316 (1969).

In Parker v. Levy, 417 U.S. 740 (1974), the appellee claimed that the asserted defects in appellants' filing of their notice of appeal should be treated as a failure to file a timely notice of appeal, and the appeal must be dismissed. Id. at 743, citing, Territo v. United States, 358 U.S. 279 (1959). The Court noted that the appellee made no claim that he did not have actual notice of the filing of the notice of appeal. The court stated that technical noncompliance does not deprive this Court of jurisdiction, and refused to dismiss the appeal on such

grounds. Parker, 417 U.S. at 743, citing, Taglianetti, 394 U.S. at 316; Heflin, 358 U.S. at 1100.

The appellees in this case certainly had timely notice of the appeal and actual notice of the filing of the notice of appeal. Therefore, this court has jurisdiction to consider the case on the merits.

B. The Appeal Presents A Substantial Federal Question

1. The Decision Below Conflicts With this Court's Decision in Loretto v. Teleprompter Manhattan CATV.

The appellees claim that Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) stands for the proposition that landlord-tenant legislation can never effect a taking, and therefore Loretto has no application to the case at bar. The Loretto Court did indeed state that "[t]his Court has

consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails," 458 U.S. at 440. This court's affirmation of the states' power to regulate the landlord-tenant relationship, however, has never been extended to sanction the uncompensated transfer to a tenant of a perpetual tenancy, which the tenant may sell to the highest bidder.

Although appellees concede that the Mobile Home Act authorizes a physical invasion of the park owner's property, they contend that the Takings Clause affords no protection where the invader was initially invited onto the property. See Appellees' Motion to Dismiss, pp. 6-7; contra, appellant's Jurisdictional

Statement, pp. 30-35. The question of whether the park owner can exercise any control over the timing, extent and nature of the initial invasion is moot, because mobile home lots are so rarely available, and because the appellees received a statutory permanent leasehold interest only after they took possession of their Lot. The appellees entered into a one year lease with Liberty on August 29, 1980, before the enactment of Public Act 81-322, which amended Conn. Gen. Stat. §21-80 by abolishing lapse of time as a ground for eviction of a park "resident."[1]

---

[1] The Connecticut Supreme Court ruled in Thompson v. Merlino Enterprises, Inc., 208 Conn. 656 (1988) that the administrator of an estate qualifies as a "resident" of a mobile home park under the Mobile Home Act, in addition to upholding the Act's constitutionality in the face of a

Prior to passage of the 1981 amendment each tenant negotiated a lease of limited duration with the park owner. These tenants enjoyed the right, assured by the 1974 amendment to the Mobile Home Act, (Public Act 74-333 codified as C.G.S. §21-79), to sell their mobile homes on their lots to purchasers who had to be accepted as new tenants so long as the buyers could pay the rent, the home was in acceptable condition and the tenants obeyed the law and the park rules. Tenants could still be evicted for lapse

---

taking challenge similar to the one before this Court in Eamiello. Thus, when the tenant dies, the park owner still cannot recover possession of his lot. The constitutional question in Thompson has also recently been considered by this Court on appeal. This Court dismissed the appeal in Merlino Enterprises, Inc. v. Thompson, 55 U.S.L.W. 9999 (U.S. Jan. 17, 1988), appeal dismissed.

of time and hence could only sell, along with the mobile home, the right to a lease of limited duration. When it passed the 1981 amendment eliminating evictions for lapse of time, however, the Legislature transferred a perpetual leasehold right to existing mobile home tenants like the appellees, who were then free to sell thatright to the highest bidder. Yet Liberty had agreed to rent a lot to the appellees for one year only. By forcing Liberty to accept the appellees and their successors as tenants <u>forever</u>, when Liberty and the appellees only bargained for a one year lease, the Mobile Home Act unambiguously crosses the line from economic regulation to an authorization of a permanent physical occupation constituting a per se taking. The Mobile Home Act thereby transformed the appellees into "interloper[s] with a government

license." F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987)

Appellees would also misapply this Court's decision in Florida Power Corp. by attempting to draw parallels between that case and the instant case. Florida Power Corp. dealt with the legitimate economic regulation of the landlord-tenant relationship, specifically, control over the rents charged to cable television companies for the right to use a utility company's lines. Florida Power Corp. merely followed a long line of cases upholding rent control. The statute before the Court in Florida Power Corp. did not provide cable companies with permanent leaseholds, nor the right to sell such leaseholds on the open market.

Appellees attempt to distinguish this case from Loretto by claiming that

Liberty may sell its land subject to the permanent leases and still receive full value. Motion to Dismiss, p. 8. Appellees overlook the fact that they, rather than Liberty, will receive the value of the permanent leasehold if they sell their mobile home on its lot as permitted by the present law. The value Liberty could receive for the park is directly diminished by the uncompensated transfer of a marketable permanent leasehold interest to the appellees.

2. The Decision Below Conflicts With Hall v. City of Santa Barbara.

Appellees also attempt to distinguish Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), reh denied, 833 F.2d 1282 (9th Cir. 1987), cert denied, , U.S. , 108 S.Ct. 1120, (1988), from this case by claiming that the existence of a rent control

statute in addition to laws granting mobile home tenants the right to sell their perpetual leasehold was pivotal to the Ninth Circuit's decision. The court below did not try to distinguish Hall in this manner, and for good reason. The Hall court found that the Santa Barbara statutory scheme, as it allegedly operated, worked a taking by physical occupation "by giving landlord and tenant complementary estates in the same land." 833 F.2d at 1279. What was "crucial" to Hall was not the existence of rent control, but rather the transfer to the tenant of the right to sell his permanent tenancy. The Santa Barbara statute perhaps worked a more egregious taking by transferring the marketable right to permanent occupancy at a reduced rent. Nevertheless, the additional marketable value of rent-control transferred to the

Santa Barbara tenants only bears on the question of the amount of compensation due the park owner for the physical occupation taking, not on whether a taking has occurred.

Appellees further argue that the Mobile Home Act, unlike the Santa Barbara statutory scheme, merely ensures that the landlord will not appropriate the tenant's investment in his mobile home. Appellees claim that the value of the permanent leasehold -- which they never contracted for with Liberty at the time they purchased their mobile home in 1980 -- represents part of their "investment." The problem with the appellees' argument is that they never paid Liberty for the right to occupy their site permanently. Nevertheless, they still seek the windfall available to them under the Mobile Home Act.

3. The Decision Below Conflicts With This Court's Decision in Nollan v. California Coastal Comm'n.

Appellees also incorrectly characterize Liberty's challenge to the Mobile Home Act under the traditional taking standard, "that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests . . .'" Nollan v. California Coastal Comm'n, U.S. , 107 S.Ct. 3141, 3146 (1987), quoting Agins v. Tiburon, 447 U.S. 255, (1980). Liberty argues not only that the Mobile Home Act has no legitimate public purpose, but that in the alternative, the law fails to further its ostensible end.

The court below found that protecting the economic interest of the tenant is a substantial public purpose, and the Connecticut legislature could

constitutionally transfer saleable permanent tenancies to park tenants because they "generally are more in need." Liberty Mobilehome Sales, Inc. v. Eamiello, 208 Conn. at 648-649, 546 A.2d 805 (1988). However, the Takings Clause of the United States Constitution only sanctions land-use regulation where there is "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it can not be said that he has been singled out unfairly." Pennell v. City of San Jose, U.S. , 108 S.Ct. 849, 862 (1988) (Justice Scalia dissenting). Liberty certainly should not bear the responsibility for the fact that the

appellees may have been the poorer of the two parties. The relative poverty of the appellees simply does not justify the transfer from Liberty to them of the marketable right to a perpetual tenancy. Although the legislature arguably could have constitutionally protected the appellees' investment in their home made before the legislature gave them the right to permanent occupancy in 1981, (in other words, the $12,500 1980 purchase price), the grant of that right gave the appellees a windfall at Liberty's expense wholly unrelated to any social evil allegedly caused by Liberty.

Liberty also argues that, in the alternative, the Mobile Home Act fails to advance substantially its stated purpose of protecting the investment of tenants. The statute is so overly broad as to be unconstitutional, because it reaches well

beyond the protection of the appellees' initial investment of $12,500 by granting them the uncompensated windfall right to capture the additional value of the permanent tenancy.

CONCLUSION

For the reasons stated above and in the jurisdictional statement, the appellant respectfully requests that this Court accept jurisdiction of this appeal.

APPELLANT

Robert L. Hirtle, Jr.
Dean B. Kilbourne
Richard M. Porter
Its Attorneys